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# New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators

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When the U.S. Constitution was ratified in 1789, it provided for a bifurcated system of electing members of Congress. The House would be directly elected by the people; the Senate would be elected by the state legislatures. Congressional vacancies were filled in a similarly bifurcated manner. For House vacancies, governors were required to call special elections. But for Senate vacancies, state legislatures were empowered to fill them.[1] Given the direct and indirect composition of the House and Senate, respectively, this disparate treatment made some amount of sense.

In the more than hundred years that followed, the system of indirect election failed. All too frequently, legislatures were gridlocked and unable to elect senators at all, leaving the state partially unrepresented.[2] When state legislatures were gerrymandered, a minority party could lose the popular vote and nonetheless win a legislative majority, granting the ability for it to elect a senator.[3] The insider nature of the process allowed corruption and bribery to flourish.[4] And, of course, as American democracy grew stronger and as the government's institutions were democratized, indirect election as a general concept aged poorly.

More than a century later, in responses to these concerns, the Seventeenth Amendment was ratified, making the Senate directly elected and changing the way that Senate vacancies were filled.[5] Under the Seventeenth Amendment, vacancies could be filled by a temporary gubernatorial election, a special election, or some combination of both.[6] The meaning of the Seventeenth Amendment's clause pertaining to Senate vacancies is not apparent at first glance, and limited litigation—along with quite a bit of constitutional scholarship—has attempted to

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1 U.S. CONST. art. I, § 2, cl. 1; § 3, cl. 2. If, however, the legislature was out of session when the Senate vacancy occurred, the Governor of the state was empowered to temporarily fill it for a term that expired when the legislature next convened. *Id.*

2 *E.g.*, Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1353 (1996).

3 E.g., Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1190 (2013).

4 *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 538–41 (1997); *see also* Amar, *supra* note 2, at 1353–54; Clopton & Art, *supra* note 3 at 1189–90.

5 U.S. CONST. amend. XVII (ratified 1913).

6 *See id.*

resolve some of the outstanding questions. When must special elections be called?[7] Do they follow the same procedure as regular elections?[8] Can a state wait until its next general election?[9] Can the state require its governor to make a same-party appointment?[10] Those questions largely remain unanswered.

Substantially less attention has been focused on the states that inspired the indirect election of senators. The Maryland Constitution, adopted in 1776, provided for one of the country's first indirectly elected legislative bodies.[11] Every five years, voters would elect members of an electoral college, who would in turn elect the Maryland State Senate.[12] Similar systems, though without the electoral college, were adopted in the 1776 South Carolina Constitution[13] and the 1776 New Hampshire Constitution.[14] The specific procedure contemplated by the Maryland Constitution inspired the Kentucky Constitution, which was adopted in 1792[15] and likely inspired

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7 *See generally* Clopton & Art, *supra* note 3 (arguing that the Seventeenth Amendment requires immediate special elections to fill vacancies).

8 *See generally* Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 Temp. L. Rev. 629, 636 (1991) (discussing the Pennsylvania practice of allowing state parties, rather than the party's voters, to select nominees for special elections in the context of special U.S. Senate elections).

9 *See generally* Clopton & Art, *supra* note 3 (arguing that the Seventeenth Amendment required immediate special elections).

10 *See generally* Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 Hastings Const. L.Q. 727 (2008) (arguing that same-party appointment requirements are unconstitutional). *But see generally* Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 Hastings L.Q. 713 (2008) (arguing that the Seventeenth Amendment permits such requirements).

11 Md. Const. arts. XIV, XV (1776).

12 *Id.*

13 S.C. Const. art. III (1776). The indirectly elected upper chamber of the South Carolina General Assembly didn't last for long. In the 1778 Constitution, it was renamed the Senate and was popularly elected. *See* S.C. Const. art. III (1778).

14 N.H. Const. para. 3 (1776) ("And that said House then proceed to choose twelve persons, being reputable freeholders and inhabitants within this colony . . . to be a distinct and separate branch of the Legislature by the name of a Council for this colony[.]"). As in South Carolina, the indirectly elected Council was later replaced; the 1784 Constitution renamed it the Senate and made it popularly elected—except with respect to vacancies. *See* N.H. Const. pt. II, para. 7, 14 (1784).

15 Joan Wells Coward, Kentucky in the New Republic: The Process of Constitution Making 28 (1979).

a similar provision in the Massachusetts Constitution, adopted in 1780.[16] In turn, the Massachusetts provision was adopted into the Maine and New Hampshire constitutions in 1820 and 1784, respectively.[17]

The Maryland system was one of the Framers' inspirations for the indirect election of United States Senators.[18] It is repeatedly mentioned in the Federalist Papers as a well-functioning system with values warranting its adoption for the federal constitution.[19] Despite that high praise, however, each state's system failed spectacularly. Kentucky's lasted just seven years and fell in the face of overwhelming public pressure. [20] Maryland's and Massachusetts's fell in the mid-nineteenth century as the country further democratized. In 1836, following a disastrously unrepresentative election and widespread discontent, the Maryland system was completely overhauled.[21] Massachusetts made changes in the 1850s and early 1860s to similar effect. [22] And the Maine and New Hampshire provisions were substantially rewritten in the late nineteenth and early twentieth centuries.[23]

These failures, coupled with the eventual abolition of all five states' systems providing for some form of indirect election for their upper chambers, are worthy of reconsideration today, especially with respect to the values that such systems were claimed to have. With many states employing methods of filling legislative vacancies that—at their *worst*—come close to indirect election, this reconsideration is timely and relevant. This Article considers the values and aspirations identified in the Federalist Papers, and in other contemporary commentaries, as applied to the state senates in three New England states: Maine, Massachusetts, and New Hampshire.

Accordingly, this Article proceeds in three parts. Part I reviews the history of the federal constitution, comparable state provisions, and how those provisions were justified in the Federalist Papers and elsewhere. It identifies several characteristics

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16 *See infra* notes 38–39, and accompanying text.

17 Susan E. Marshall, The New Hampshire State Constitution: A Reference Guide 153 (2004); Marshall J. Tinkle, The Maine State Constitution: A Reference Guide 71–72 (1992).

18 Feerick, *infra* note 43, at 252 n.34; Hagensick, *infra* note 43, at 347; Rees, *infra* note 43, at 248–49.

19 The Federalist No. 63 (James Madison).

20 Coward, *supra* note 15, at 102–03.

21 *See generally* Hagensick, *infra* note 43 (discussing the 1836 Maryland constitutional amendment).

22 Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 27 J.L. & Pol'y 564, 580–82 (2020).

23 *Id.*

of indirect election that were deemed desirable in post-Revolutionary America. Part II explores, for the first time, how state senates in three New England states—Maine, Massachusetts, and New Hampshire—were constituted, what membership patterns were noticeable during the period of partial indirect election, and how other state actors manipulated the rules to achieve their desired composition. Finally, Part III merges the first two parts together: it compares the values identified in Part I with the composition of the state senates as identified in Part II. It ultimately concludes that these state senates failed to live up to their asserted values and instead became some of the country's most undemocratic political institutions.

## I. THE HISTORY OF INDIRECT ELECTION

Beginning with Maryland's 1776 Constitution, several states throughout the United States adopted systems of indirect election for their upper legislative chambers. Maryland's system inspired those that followed, including the federal Constitution's method of indirectly elected Senators. Section A of this Part details the history of how these systems were adopted, beginning with the Maryland Senate and including the Kentucky, Maine, Massachusetts, New Hampshire, and United States Senates. Then, Section B details, to the greatest extent possible, why these systems were adopted and what values were identified by contemporary political philosophers.

### *A. The Adoption of Indirectly Elected Legislatures*

The Maryland Constitution, adopted in 1776, provided for a directly elected House of Delegates and an indirectly elected Senate. Maryland's system allowed the residents of each county to elect a set of two electors to an electoral college. This electoral college, once constituted, would then elect the members of the Senate.[24] Despite the fact that the electoral college was frequently divided between members of *two* parties, the Senate's ultimate composition was not divided at all, and almost always only included members of *one* party.[25] And when vacancies occurred, the

[24] Md. Const. arts. XIV, XV (1776).

[25] Michael J. Dubin, Party Affiliation in the State Legislatures: A Year by Year Summary, 1796–2006 85–86 (2007) (noting that the electoral college elected a unanimous Democratic–Republican Senate in 1801, 1806, 1811, and 1821; a unanimous Federalist Senate in 1816; a unanimous National Republican Senate in 1831; and a unanimous Whig Senate in 1836); Steiner, *infra* note 69, at 133 (noting that the electoral college elected a "unanimously Whig and patriotic" senate in 1786 and unanimous Federalist Senates in 1791 and 1796). In 1826, however, the National Republican majority "determined to give a practical proof of their zeal for reform by pledging themselves, if elected, 'to vote for a liberal senate, without reference to political motives.'"

Senate would fill the vacancies itself.[26] The practical result was apparently that, because vacancies occurred so frequently, the Senate would effectively reconstitute itself as it filled vacancies; some years, the Senate was almost entirely composed of senators who had been selected by the Senate to fill vacancies, resulting in the *indirect* indirect election of the chamber.[27]

The proposed Massachusetts Constitution of 1778 proposed a similar but substantially more complicated method of indirect election, which involved a series of back-and-forth interactions between the legislature and the voters.[28] Despite the complexity of the process, the practical result was that the state senate was to be indirectly elected, which is how the voters understood the system at the time it was proposed[29] and how historians and scholars have since interpreted it.[30] The 1778 constitution was poorly received and was widely rejected by the voters, largely because it lacked a bill of rights,[31] but the provision for electing the Senate was also

*Id.* at 134 (citation omitted). True to form, 6 of the 22 National Republican electors joined with the 14 Federalists to elect 11 National Republicans and 4 Federalists to the Senate, *id.*, the only time that the Maryland Senate was mixed. *Compare id.*, with Dubin, *supra*, at 85–86.

[26] Md. Const. art. XIX (1776).

[27] Hagensick, *infra* note 43, at 347–48.

[28] Mass. Const. art. IX (proposed 1778), *reprinted in* Mass. Const. Convention, Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay 259 (1780) [hereinafter 1780 Constitutional Convention Journal].

[29] *E.g.*, Result of the Convention of Delegates Holden at Ipswich in the County of Essex, Who Were Deputed to Take into Consideration the Constitution and Form of Government, Proposed by the Convention of the State of Massachusetts-Bay 43 (John Mycall, 1778) [hereinafter Essex Result] ("And will not the house of representatives in fact chuse the senators? That independence of the senate upon the house, which the constitution seems to have intended, is visionary, and the benefits which were expected to result from a senate, as one distinct branch of the legislative body, will not be discoverable.").

[30] Samuel Eliot Morison, A History of the Constitution of Massachusetts 16 (1917) ("There was a legislature of two branches, but the Senate was elected indirectly, and acted as the Governor's Council as well as upper House."); Alexander J. Cella, *People of Massachusetts, a New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority 1774–1780*, 14 Suffolk U. L. Rev. 975, 991 (1980) ("Although the constitution provided for a bicameral legislature, the Senate was to be elected indirectly and would act as a Governor's Council as well as a branch of the legislature.").

[31] Lawrence M. Friedman & Lynnea Thody, The Massachusetts State Constitution 9 (2011); Edward F. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 Suffolk U. L. Rev. 873, 880 (1980).

a source of opposition.[32] However, the opposition was not to *indirect* election, but *how* the Senate was indirectly elected. Some of the opponents of the 1778 constitution proposed their own system of electing the Senate indirectly; "the Essex Result proposed a system of indirect elections through county conventions that was so complicated as to be practically unworkable."[33]

The 1780 Massachusetts Constitution partially abandoned this idea, but nonetheless maintained a strong role for the legislature in determining the composition of the Senate. Under the 1780 constitution, members of the Senate were only elected upon receiving a majority of the vote.[34] But if no candidate received a majority of the vote (or if a vacancy occurred from resignation, death, or otherwise), the entire legislature would select one of the top two candidates to fill the seat.[35] Depending on the year, between a quarter and three-quarters of the entire Senate would be chosen in this manner because of a failure to elect. This reality effectively gave parties the ability to engage in gamesmanship. If they were able to run enough spoiler candidates to split their opponents' vote, deny them a majority, and throw the election to the legislature, they could win extra Senate seats—or even outright control of the chamber.[36] Some delegates argued for a different system, which would lower the majority requirement for election or which would allow the district to fill the vacancy itself, but these proposals failed.[37]

The origin of both the 1778 and the 1780 provisions is somewhat unclear. Both are similar to the Maryland provision, and other provisions of the Massachusetts Constitution were clearly derived from other state constitutions, including Maryland's.[38] Given that Maryland was alone in post-Revolutionary America in

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[32] *E.g.*, ESSEX RESULT, supra note 29, at 43 ("The ninth article regulates the election of Senators, which we think exceptionable.").

[33] Cella, *supra* note 30, at 995; *see also* ESSEX RESULT, *supra* note 29 at 51–54 (laying out the proposed system of indirect Senate election).

[34] MASS. CONST. pt. II, ch. 1, § III (1780).

[35] *Id.* § II, art. IV.

[36] Yeargain, *supra* note 22, at 581.

[37] 1780 CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 28, at 73–74; *see also* Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 PROC. AM. ANTIQUARIAN SOC'Y 317, 339 (1980) ("[S]ome delegates preferred that the problem should go back to the people in some way, but none of these alternatives for filling vacant Senate seats passed.").

[38] *E.g.*, MORISON, *supra* note 5, at 23 (noting that the 1776 Maryland Constitution was a source for the 1780 Massachusetts Constitution); Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 208 (2000) ("When John Adams assumed the principal role of drafting Massachusetts's constitution in 1779, he benefited from existing state constitutions. Indeed, after being elected a delegate to

having an indirectly elected Senate[39] *and* that Massachusetts borrowed heavily from other states' constitutions,[40] it seems a reasonable inference that the election (and method of filling vacancies) of the Senate was derived, at least in part, from the Maryland provision.

From there, the provisions proliferated to the New Hampshire Constitution and the U.S. Constitution. The New Hampshire Constitution, adopted in 1784, borrowed heavily from the Massachusetts Constitution of 1780,[41] and adopted its Senate composition almost verbatim.[42] The Maryland Constitution served as the inspiration for both the U.S. Constitution's indirect election of Senators and perhaps even for the Electoral College.[43] In 1792, Kentucky drafted its first constitution based in large part on the Pennsylvania Constitution[44] (and to a lesser extent, the Virginia Constitution[45]), but copied the Maryland model, creating a state

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the constitutional convention, Adams reflected that their work would inevitably draw from earlier state constitutions. Although happy 'of having a share in this great Work,' he wrote Benjamin Rush that it was 'impossible for Us to acquire any Honour, as so many fine Examples have been recently set Us.' Indeed, his final draft, particularly in the declaration of rights, shows the signs of his borrowing."); Taylor, *supra* note 37, at 331 ("[John] Adams's articles XXII–XXVI most nearly parallel five of Maryland's articles in order and substance, but Maryland drew on Delaware.").

39 David Ramsay, 1 The History of the American Revolution 445 (Trenton, James J. Wilson 1811) ("Ten of the eleven states, whose legislatures consisted of two branches, ordained that the members of both should be elected by the people. . . . Maryland adopted a singular plan for constituting an independent senate."); *see also* Yeargain, *supra* note 22, at 573–74.

40 *E.g.*, Baum & Fritz, *supra* note 38, at 208.

41 Marshall, *supra* note 17, at 1.

42 *See id.* at 165 ("The 1784 version of this article was almost the same as the corresponding provision in the 1780 Massachusetts Constitution.").

43 John D. Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 252 n.34 (1968); A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 Md. Hist. Mag. 346, 347 (1962); Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. Balt. L. Rev. 217, 248–49 (2007).

44 John D. Barnhart, *Frontiersmen and Planters in the Formation of Kentucky*, 7 J. S. Hist. 19, 34 (1941); (noting that "almost three fourths of [the Kentucky Constitution of 1792's] sections were taken from the Pennsylvania constitution of 1790, many having been copied with only the change of a few words necessary to adapt them to the local situation"); Baum & Fritz, *supra* note 38, at 209 ("In the end, Pennsylvania's 1790 constitution became the principal model that guided Kentucky constitution-makers in framing the fundamental law in 1792.").

45 *See, e.g.*, Ashley Kay Taulbee, The Kentucky Constitutional Conventions and the Federalism of the Founding Fathers 17–18 (Apr. 19, 2017) (unpublished M.P.A. thesis, Morehead State University) ("Not only did Pennsylvania's 1790 constitution influence Kentucky's 1792 constitution, but so did Virginia's constitution. . . . Virginia's local governments and state government cabinets and agencies were adopted by Kentucky."). *But see* Barnhart, *supra* note 44,

senate elected by an electoral college.[46] Finally, when Maine joined the Union in 1820, it was heavily influenced by the 1780 Massachusetts Constitution and, like New Hampshire, adopted its Senate composition.[47]

It is worth noting, however, that despite the *de jure* direct election of the Senate in Maine, Massachusetts, and New Hampshire, those states effectively adopted *de facto* indirect election procedures. The decision by Massachusetts and New Hampshire to require a majority vote for the state senate, and to allow the legislature to fill vacancies, all but ensured that their state senates would be disproportionately selected by the legislatures. As this Article details later, on average, about 15% of both state senates' members were legislatively elected.

But looking at just the average obscures how extreme both state senates were in their composition. Both states routinely saw between one-quarter and one-half of their state senates appointed by their legislatures, with some years exceeding half and even approaching three-quarters. During the period of time immediately following the adoption of both states' constitutions, this was especially true. In Massachusetts, from 1781 to 1790, an average of 24% of the Senate was selected by the General Court. This decreased slightly to 21.5% from 1790 to 1800 before bottoming out in the early nineteenth century. But in New Hampshire, from 1784 to 1793—the first decade following the adoption of the New Hampshire Constitution—an average of 52% of the Senate was selected by the legislature. And the decade after that, about 40% of the Senate was so selected, before leveling out at an average of about 10% for the century that followed.[48]

Considering the time period in which these provisions were adopted, this persistent failure to elect makes sense. In the 1780s, the United States operated under the Articles of Confederation and, lacking the sort of national elections that inspired polarization, also lacked political parties.[49] Politicians were divided based on ideology—conservatives and populists, though they did not so identify at the time—as opposed to party. These ideological divisions, though concrete, did not result in the kind of polarization that we know today. As a result, in most state

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at 23–24 (noting that a Federalist Paper-esque editorial authored by a "Disinterested Citizen" "advocated a system of checks and balances and a bill of rights, urging that the example of Virginia be avoided because the legislature possessed too much power").

[46] Barnhart, *supra* note 44, at 35 ("The electoral college was copied from the Maryland constitution and, of course, represented a deviation from the Pennsylvania document.").

[47] Tinkle, *supra* note 17, at 4–5, 71–72.

[48] *See* Appendix C (All calculations in the appendices were done using spreadsheets on file with the author. They are available upon request).

[49] John F. Hoadley, Origins of American Political Parties, 1789–1803 27–28 (1986).

legislatures, neither conservatives nor populists won clean majority. Instead, independents, "who switched back and forth between the two blocs depending on the issue, usually held the balance of power."[50]

This was largely true in both Massachusetts and New Hampshire. In Massachusetts, the Commonwealth was sharply divided, with conservatives in the eastern, urban parts of the state and populists in the western, rural parts of the state.[51] In New Hampshire, meanwhile, ideological divisions were considerably weaker than in Massachusetts, but followed similar patterns. There, the divisions were between the southeastern region of the state where Portsmouth was located, in which the voters were more conservative, and the interior of the state, in which the voters were more populist.[52] Nonetheless, this binary only extended so far; many other state legislators belonged to neither bloc and the different regions of the state behaved idiosyncratically.[53]

Maine, meanwhile, only achieved statehood in 1820, more than three decades after the U.S. Constitution was ratified, and during the waning years of America's First Party System.[54] While political parties were *generally* stronger during this time, the Democratic–Republican Party was so dominant when Maine was admitted to the Union that the idea of a two-party system almost entirely collapsed.[55] Nonetheless, Maine adopted those states' vacancy-filling procedure after it had been in place in both states for a combined 75 years. In considering how to fill its state senate vacancies—and in deciding whether to require majority elections—the new state's framers had a bounty of information at their disposal if they wanted to use it. But the records of the 1819 Constitutional Convention indicate that the framers adopted the constitutional provision without discussion.[56] Accordingly, while external conditions at the time may not have made it likely that the Maine

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[50] James Reichley, The Life of the Parties: A History of American Political Parties 20 (1992).

[51] *Id*. at 22.

[52] Jackson Turner Main, Political Parties Before the Constitution 296–301 (1973).

[53] *Id.* at 296–97, 302.

[54] *See, e.g.*, Martin P. Wattenberg, *The Decline of Party Mobilization*, *in* Parties Without Partisans: Political Change in Advanced Industrial Democracies 64 (Russell J. Dalton & Martin P. Wattenberg eds., 2000) (noting that the First Party System ended by the early 1820s).

[55] *See* Reichley, *supra* note 50, at 51.

[56] Me. Const. Convention, The Debates and Journal of the Constitutional Convention of the State of Maine 1819–'20 and Amendments Subsequently Made to the Constitution 61 (Augusta, Maine Farmers' Almanac Press 1894) (adopting the provision without discussion).

Senate would be disproportionately indirectly elected, it may have reasonably expected, based on past precedent from its neighbors and constitutional ancestors, that it would have been.

With these realities present—that is, no parties, weak ideological divisions, and plenty of ideologically mixed candidates—it is unsurprising so many elections produced no majority winners, thereby triggering each state's vacancy-filling procedure. Accordingly, for all practical purposes, Maine, Massachusetts, and New Hampshire adopted a quasi-indirectly elected state senate—or at least attempted to.

Finally, Connecticut's method of electing its state senate followed a similar trajectory and is worth noting in passing. The state's first constitution, adopted in 1818, provided for a 12-member senate that was elected statewide, not by district.[57] This really just constitutionalized the existing political reality, which had been established nearly two centuries earlier during its colonial government.[58] However, the 1818 constitution provided that any ties that occurred in Senate elections would be resolved by the House of Representatives.[59] Tied elections are *extremely* uncommon[60] and are usually resolved through some game of chance.[61] While it is not uncommon for states to have methods of filling vacancies caused by tied elections that differ from the ordinary way in which they fill vacancies,[62] tied elections do not generally cause vacancies that need to be filled through some affirmative action by a state actor—at least not today.[63] When Connecticut adopted the provision in its 1818 constitution allowing its state house to resolve a tied election for the state senate, it was exponentially likelier than today that such a situation would present itself. Had this provision been systematically used when it

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[57] CONN. CONST. art. III, §§ 4, 6 (1818).

[58] WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE 10–11 (2011).

[59] CONN. CONST. art. III, § 6 (1818).

[60] Casey B. Mulligan & Charles G. Hunter, The Empirical Frequency of a Pivotal Vote 7 (Nat'l Bur. Econ. Res., Working Paper No. 8590, 2001), https://www.nber.org/papers/w8590.pdf [https://perma.cc/6SP3-DUDC] (noting that, of 40,036 state legislative elections, only 2, or 0.004%, were tied).

[61] *Resolving Tied Elections for Legislative Offices*, NAT'L CONF. ST. LEGIS. (Jan. 4, 2018), https://www.ncsl.org/research/elections-and-campaigns/resolving-tied-elections.aspx [https://perma.cc/W2C3-7SL5].

[62] *Compare, e.g.*, MONT. CODE ANN. § 5-2-402 (2019) (allowing the county commission in which a legislative district is located to fill a vacancy) *with id.* § 13-16-503 (allowing the governor, in the case of a tied election, to appoint one of the candidates to the seat).

[63] *Supra* note 61.

was operative, the Connecticut State Senate might have been considered to be, like Maine, Massachusetts, and New Hampshire, *de facto* indirectly elected. Nonetheless, in the 10-year period between 1818, when the constitution was adopted, and 1828, when the constitution was amended to provide for district-based elections,[64] no such ties occurred[65] and the House accordingly never picked a member of the Senate.

### *B. The Value of Indirect Election*

The Maryland Senate was created in its particular form for reasons that echo why the U.S. Senate was *also* created in unelected form. According to Maryland historian John Van Lear McMahon, the Senate's composition was meant to serve as an aristocratic, measured counterpart to the high-turnover House of Delegates.[66] The House, he argued, produced "hasty, capricious, mutable, and inefficient legislation," and failed to provide a meaningful check on the governor (which, at that time, was elected by the legislature and had no veto).[67]

The result was, at the time, quite well-received. Contemporary observers praised the Maryland Constitution for its creation of indirect elections. Samuel Chase—a delegate to the Continental Congress who was later appointed to the United States Supreme Court—apparently described the Maryland Senate's composition as "virgin gold,"[68] though this quotation may be apocryphal.[69] Historian David Ramsay argued that the Senate "consisted of men of influence, integrity and abilities, and such as were a real and beneficial check on the hasty proceedings of a more numerous branch of popular representatives."[70] He contended that Maryland's laws "were well digested, and its interest steadily pursued with a peculiar unity of system," unlike in other states, where "the

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64 Conn. Const. of 1818 art. III (amended 1828).

65 Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, https://elections.lib.tufts.edu/ [https://perma.cc/K74X-76ER] (last visited Feb. 6, 2021).

66 John V. L. McMahon, 1 An Historical View of the Government of Maryland: From Its Colonization to the Present Day 479 (Baltimore, Lucas & Deaver 1831).

67 *Id.* at 479–80.

68 *Id.* at 480; Hagensick, *supra* note 43, at 347.

69 Bernard C. Steiner, *The Electoral College for the Senate of Maryland and the Nineteen Van Buren Electors*, *in* Annual Report of the American Historical Association for 1895 129, 131–32 (Washington, D.C., Government Printing Office 1896) ("[T]radition has it that Samuel Chase declared the institution to be 'virgin gold,' so much was he carried away by its excellencies.") (citing McMahon, *supra* note 14, at 480).

70 Ramsay, *supra* note 39, at 446.

legislative department was not sufficiently checked, that passion and party predominated over principle and public good."[71]

McMahon, while commenting dispassionately on the system, nonetheless emphasized that the state's framers had intended to create an independent chamber of the legislature to represent the state's interests, not just those of the individual legislator's particular district. He noted that the state's framers apparently had two goals in mind: "the equal influence of the counties in its choice" and "the selection of the senators, as the representatives of the State at large and not of particular sections."[72] Once inaugurated, the electoral college was entitled to pick whomever it wanted to fill the state's 15 senate seats—so long as 9 senators were from Western Maryland and 6 were from the Eastern Shore.[73] While the State House seats were allocated based on geography (and to a lesser extent, population), senate seats could be awarded based on whatever criteria the electors wished to consider.[74] The purpose of arranging the legislature this way guaranteed that the State House Delegates were loyal to and representative of their districts, while the Senators "discharge [their] duty under the eye of the whole State, and under a high sense of responsibility to the community which they dared not disregard."[75] If this distinction had not been created, and if the Senate had been directly elected, where Senators represented individual districts just like Delegates, then it would be "a mere copy of that of the house of delegates in all but the duration of the office," minimizing any checks that each chamber would be able to assert over the other.[76]

To that effect, McMahon disputed that meaningful checks came from a bicameral, popularly-elected legislature merely because the legislators in each chamber were elected to terms of different lengths. A check, he argued, "consists in the existence of different responsibilities, and different influences, so well balanced against each other, as to give to each its due operation, and to deny to all an undue preponderance."[77] As specifically applied to Maryland, he argued that the state's geography created diverse interests necessitating a legislative chamber dedicated

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71 *Id.*

72 McMahon, *supra* note 66, at 482.

73 MD. Const. art. XV (1776); *see also* McMahon, *supra* note 66, at 474 ("[T]he college must then proceed to elect fifteen senators, of whom nine shall be residents of the Western, and six of the Eastern shore: but this distribution being respected, they are subject to no other restriction, in choosing amongst persons qualified for the office of senator.").

74 *See* McMahon, *supra* note 66, at 474.

75 *Id.* at 482.

76 *Id.* at 483.

77 *Id.* at 484.

to statewide interests.[78] "If ever there was a State, in which local interests have operated to the general prejudice, it is the State of Maryland."[79]

Indeed, Federalist Number 63, advocating for the adoption of the indirect method of election for the U.S. Senate, raised similar arguments. James Madison, the author, begins by noting that the Senate's utility derives from "the want of a due sense of national character" and the stability that it would bring to government. He argues that a national character "can never be sufficiently possessed by a numerous and changeable body"; instead, "[i]t can only be found in a number so small" that praise and blame can reasonably be attributed to each person or "in an assembly so durably invested with the public trust, that the pride and consequences of its members may be sensibly incorporated with the reputation and prosperity of the community."[80]

Separately, Madison argued that the government owed responsibility to its people in two separate ways: "measures which singly have an immediate and sensible operation," which is adequately provided by a popularly elected legislative chamber, and "well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation," which is provided by an *unelected* chamber.[81]

He also argued that an unelected Senate was required "as a defense to the people against their own temporary errors and delusions," to ensure that "the cool and deliberate sense of the community ought . . . ultimately prevail over its rulers." When people "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn," they must be met by a "temperate and respectable body of citizens" to interfere.[82]

Finally, he argued that the Senate would not be transformed "into a tyrannical aristocracy" through its indirect election because the other branches of government would be insulated. "Before such a revolution can be effected, the Senate, it is to be

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[78] "The noble pay, which intersects our State, has almost become the line of demarcation between distinct people and governments; and every variety of local interests, every peculiar advantage of situation, have been brought into requisition to scatter dissensions amongst us. How well they have accomplished it, rallying shore against shore; counties against counties; Potomac interests against Susquehanna interests, and Eastern shore interests against both: county jealousies against Baltimore influence; and Baltimore apprehensions of county enmity, let the past transactions of our legislature determine." *Id.* at 485.

[79] *Id.*

[80] The Federalist No. 63 (James Madison).

[81] *Id.*

[82] *Id.*

observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large." This, he argued, constituted insurmountable obstacles—even if the Senate were corrupted, the state legislatures are refreshed frequently enough to prevent any persistent corruption, and the opposition in the House of Representatives "would inevitably defeat the attempt."[83]

Madison heaped praise on the Maryland model as a case study for how these arguments played out in real time. He argued that the success of the Maryland model disproved any skepticism that the U.S. Senate would function poorly; "[i]f reason condemns the suspicion [of the U.S. Senate], the same sentence is pronounced by experience." In other words, "[i]f the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared." Madison argued that the experiment of the Maryland system "gradually extinguished" any skepticism that anti-Federalists might have of the U.S. Senate through the "progress of the experiment." Specifically, he noted that the Maryland Senate had a "salutary operation" and had earned "a reputation in which it will probably not be rivalled by that of any State in the Union." And with regard to the senate's ability to fill its own vacancies, Madison referred to it as a "remarkable prerogative."[84]

Much of the rationale of the Maryland framers and Federalist Paper Number 63 was likewise embraced by the framers of the 1792 Kentucky Constitution, which also provided for an indirectly elected Senate. George Nicholas, one of the leaders at the state constitutional convention, pushed for a senate like Maryland's, where voters cast ballots for members of an electoral college, which would in turn elect the Senate. Nicholas's first proposal was to ditch Maryland's loose geographic requirements and instead to make all eleven state senators elected statewide to "avoid the dangers of excessive localism." [85] The convention, however, only embraced Nicholas's idea in part. It instead provided for two at-large senators and one senator to be elected for each of Kentucky's nine counties.[86]

Like the framers of the Maryland Constitution, the Kentucky framers simultaneously wanted to avoid an oligarchy or tyranny *and* a government that surrendered too easily to democratic impulses. [87] The final proposal for the

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[83] *Id.*

[84] *Id.*

[85] Lowell H. Harrison, Kentucky's Road to Statehood 119–20 (1992).

[86] *Id.* at 120.

[87] *Id.* at 117.

legislature's composition—a democratically elected State House with one-year terms and an indirectly elected State Senate with four-year terms—accommodated these concerns and reflected a compromise between "radicals" who supported a unicameral legislature with universal (white male) suffrage and "conservatives" who favored a bicameral legislature and property-based voting rights.[88] The democratically elected State House would be countered by the indirectly elected Senate, which was deliberately designed to be an aristocratic body. In a letter to James Madison, Nicholas made this design quite clear:

> Notwithstanding all have a right to vote and to be elected, the wealthy will nineteen times out of twenty be chosen [to serve in the Senate]. The house of representatives will therefore always have a majority at least of it's members men of property. The Senate will be composed altogether of men of that class. I will give up my opinion as soon as I see a man in rags chosen to that body.
>
> The Senate then will compose an impenetrable barrier for it's security; and the [House of Representatives] from the mixture that there will be in their body, and from their immediate dependance on the people at large, will form as effectual a one for personal liberty and privileges.[89]

This prediction proved correct after the first election. The electoral college effectively elected *itself* to the Senate, with eight of the eleven members having served on that year's electoral college.[90]

In short, the asserted values that were served by indirect election might well be conceived as belonging to five different categories: (1) operating as a meaningful check on the democratic impulses served by the House of Representatives;[91] (2)

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[88] *Id.* at 118, 130.

[89] Letter from George Nicholas to James Madison (May 2, 1792) (on file with the National Archives), https://founders.archives.gov/documents/Madison/01-14-02-0275 [https://perma.cc/5E5C-TWTY]. *See also* HARRISON, *supra* note 85, at 121.

[90] HARRISON, *supra* note 85, at 134.

[91] *Id.* at 117 (discussing the Kentucky model); MCMAHON, *supra* note 66, at 479–80 (discussing the Maryland model); RAMSAY, *supra* note 38, at 446 (discussing the Maryland model); THE FEDERALIST NO. 63 (James Madison) (discussing the U.S. Senate).

creating a well-qualified body;[92] (3) advancing the State's long-term interests;[93] (4) not advancing the parochial interests of a particular region or district;[94] and (5) avoiding corruption.[95]

## II. NEW ENGLAND'S INDIRECTLY ELECTED SENATES

For a combined 208 years, three state senates in New England—Maine (1820–1899), Massachusetts (1780–1860), and New Hampshire (1784–1913)—were, at least in part, indirectly elected. Each of these state's constitutions required that state senators receive a majority of the vote—and if no candidate in a particular seat won a majority, a vacancy was declared in the seat and it was filled by the entire legislature.[96] During the period of time in which these constitutional provisions

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[92] McMahon, *supra* note 66, at 479; Letter from George Nicholas to James Madison, *supra* note 89. We might read the discussion of qualifications, as written in the eighteenth and nineteenth centuries, as an argument in favor of aristocratic characteristics—being well-read, well-educated, and of means. The arguments for an unelected Senate in the Federalist Papers do not *explicitly* argue for an aristocracy, and indeed, Madison argues *against* the assumption that the Senate would be aristocratic—"the federal Senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body." The Federalist No. 63 (James Madison). It is difficult to square Madison's facial arguments—which responded to concerns from anti-Federalists, *e.g.*, Daniel Wirls et al., The Invention of the United States Senate 164 (2004) ("Anti-Federalists feared that a permanent aristocracy would take root in the Senate[.]")—with how state constitutional framers discussed an unelected Senate. George Nicholas, James Madison's close friend, *explicitly* told Madison of his confidence that the Kentucky Senate would be composed of aristocrats. *E.g.*, Letter from George Nicholas to James Madison, *supra* note 89 ("The Senate will be composed altogether of men of that class [property owners]. *I will give up my opinion as soon as I see a man in rags chosen to that body.*") (emphasis added).

[93] *See* Harrison, *supra* note 85, at 119–20; McMahon, *supra* note 66, at 474–82; The Federalist No. 63 (James Madison)

[94] *See* Ramsay, *supra* note 38, at 446; The Federalist No. 63 (James Madison). George Nicholas's arguments in favor of an unelected Senate in Kentucky focused, at least in part, on his belief that the legislature needed to protect property rights, that doing so was in the State's long-term interest, and that an unelected Senate was best equipped to do so. *See* Harrison, *supra* note 85, at 119–20 (noting that Nicholas argued that an unelected Senate would better preserve property rights); Letter from George Nicholas to James Madison, *supra* note 89 (arguing that "where there is a Senate chosen by electors . . . the security of property" will be preserved).

[95] This was one of the primary arguments in the Federalist Papers in support of an unelected Senate, *see* The Federalist No. 63 (James Madison), but it was also an argument embraced—perhaps more implicitly—in support of unelected state senates. *See, e.g.*, Ramsay, *supra* note 39, at 446 (noting that men of "integrity" would be elected to the Maryland Senate and would counter the House of Delegates).

[96] *See, e.g.*, N.H. Const. pt. 2 (1784).

were operative, state legislatures in Maine, Massachusetts, and New Hampshire filled at least 1,000 senate vacancies through indirect election.[97] State by state, that encompasses approximately 199 senate seats in Maine, 231 in New Hampshire, and 595 in Massachusetts.[98] Regardless of the exact number, however, the cumulative effect of these vacancies in all three states was substantial. But absent a handful of individual controversies, little attention has been paid to them.

This Part remedies that lack of attention by comprehensively and exhaustively reviewing the history of how these three New England states filled Senate vacancies in the late eighteenth century and for most of the nineteenth century. Section A begins by explaining the vacancy-filling provisions in each of the state's constitutions. It provides several hypotheticals to explain how the provisions worked and were intended to work. This Section also raises several questions relating to the ambiguity of the provisions, as well as how the legislatures in each state addressed some of them. Then, Section B explains, based on the data compiled in the Appendices, what patterns were noticeable in how the legislatures filled vacancies. This Section does so specifically by addressing which periods of time more vacancies were filled and the characteristics of the average candidate selected to fill a vacancy. Finally, Section C explores several challenges and controversies in how the legislature opted to fill vacancies and how the vacancy-filling provision implicated separations-of-powers concerns.

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[97] These numbers were arrived at by reviewing every New Hampshire Senate Journal from 1784 to 1913 (with the exception of the unavailable 1871 Senate Journal, for which the 1871 House Journal was substituted) and every Maine Senate Journal from 1820 to 1899, and noting how many times vacancies were acknowledged by the journals. With respect to Massachusetts, because it inconsistently printed legislative journals prior to 1860, its numbers were arrived at by reviewing House Journals from 1781 to 1799, Senate Election Committee reports, and newspaper articles.

[98] These numbers are necessarily conservative for two reasons. First, with respect to Massachusetts, the haphazard manner in which data was collected prevents a full and complete accounting of the number of *midsession* vacancies that the state experienced during this time. Without the presence of a consistently kept legislative journal dutifully recording each vacancy filled, newspaper articles were the primary source. However, there is no guarantee that *every* midsession vacancy filled by the Massachusetts General Court generated a mention in a newspaper. Second, even in Maine and New Hampshire, where the number of vacancies *filled* is precise, the number of total vacancies necessarily omits midsession vacancies that weren't recorded by legislative journals. For most of this time period, both the Maine Legislature and the New Hampshire General Court met in annual, month-long legislative sessions, with occasional special sessions. If a vacancy occurred—through death, resignation, or otherwise—during a period of time not captured in a Senate Journal, it is not included in these numbers. Regardless of the conservative nature of the overall estimate, the table containing all data referenced in this Article is included in APPENDICES A, B, AND C, *infra*.

### *A. How Vacancies Were Filled*

Under Massachusetts's 1780 Constitution, New Hampshire's 1784 Constitution, and Maine's 1820 Constitution, vacancies could come about in two ways. The first is through what we might reasonably think a "vacancy" entails—like the "death, removal out of the state," resignation of the incumbent, or some other voluntary or involuntary action that prevents the incumbent from being able to serve.[99] The second is through the constitutions' implementation of their majority-vote requirement, which effectively created a vacancy in any district where no candidate won a majority of the vote. Despite the fundamental and meaningful distinction in *why* the vacancies occurred, both kinds were filled in roughly the same manner under all three constitutions. The Massachusetts and New Hampshire Constitutions provided that:

> The members of the house of representatives, and such senators as shall be declared elected, shall take the names of the two persons having the highest number of votes in the district, and out of them shall elect, the senator wanted for such district[.][100]

The Maine Constitution used similar language, but the difference is relevant and worth noting:

> [T]he members of the house of representatives and such senators, as shall have been elected, shall from the highest number of the persons voted for, on said lists, equal to twice the number of senators deficient, in every district, if there be so many voted for, elect by joint ballot the number of senators required[.][101]

Stated more plainly, and using the terminology preferred by the legislature, the House and Senate would convene in a joint convention and pick a candidate. While most votes in each state's legislature were done by voice vote, joint convention votes are done by written ballot.[102] This procedure, common to all three states, has been

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[99] The 1784 Constitution only lists "death" and "removal out of the state" as vacancy-causing actions. *See* N.H. Const. pt. 2 (1784). However, the full list of vacancy-causing actions includes involuntary actions like death, criminal conviction, or recall, and voluntary actions like running for office (in a resign-to-run state); winning office; receiving an appointment; moving out of the district; or resignation due to ill health, private-sector employment, or losing re-election. Keith Hamm & David M. Olson, *Midsession Vacancies: Why Do State Legislators Exist and How Are They Replaced?*, *in* Changing Patterns in State Legislative Careers 127, 130 (Gary F. Moncrief & Joel A. Thompson eds., 1992).

[100] N.H. Const. pt. II (1784); MA. Const. pt. II, ch. 1, § 3 (1780).

[101] Me. Const. art. IV, pt. II, § 5 (1819).

[102] *Compare* H. J., Gen. Sess. 12 (N.H. 1871) ("[T]he roll being called by the Clerk, and each member passing through the desk and depositing his ballot with the chairman."), *with id.* at app'x. at 6 ("Questions shall be distinctly put in this form, to wit: 'As many as are of the opinion that,' (as the case may be) 'say aye'; and after the affirmative vote is expressed, 'Those of a contrary opinion, say

mostly abolished. The Massachusetts General Court retains the ability to fill vacancies at a joint convention if they occur in the Executive Council[103] or if they occur from a failure to elect statewide officers, like Attorney General, Auditor, Secretary of State, and Treasurer.[104] Maine retains this procedure to select its Attorney General, Secretary of State, and Treasurer—none of whom is directly elected by the people.[105] New Hampshire, like Maine, uses the same procedure to elect its Secretary of State and Treasurer,[106] which attracted some attention in 2019 when Secretary of State Bill Gardner, who was first elected in 1976, was challenged for re-election and barely won.[107] It is also used, at least theoretically, to select the Governor, members of the Executive Council, and members of the Senate where no candidate is legitimately elected.[108]

For an illustration of how a state senate vacancy in Massachusetts or New Hampshire prior to 1860 or 1913, respectively, might have been filled in each of the two types of vacancies, consider the following hypothetical.

| | | |
|---|---|---|
| Candidate A: | 2,250 votes | 45% |
| Candidate B: | 1,500 votes | 30% |
| Candidate C: | 1,000 votes | 20% |
| Candidate D: | 250 votes | 5% |

No candidate has won a majority of the vote. Accordingly, the House and the Senate would meet in a joint convention to fill the vacancy. Assuming that both Candidates

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no.' If the Speaker doubts, or if a division is called for, the House shall divide. Those in the affirmative of the question shall first rise from their seats and stand till they be counted, and afterward those in the negative shall rise and stand till they be counted. The Speaker shall then rise and state the decision of the House.").

[103] Mass. Const. amend. art. XXV ("In case of a vacancy in the council, from a failure of election or other cause, the senate and house of representatives shall, by concurrent vote, choose some eligible person from the people of the district wherein such vacancy occurs, to fill that office.")

[104] *Id.* at amend. art. LXXIX ("In case of a failure to elect either of said officers on the day in November aforesaid, or in case of the decease, in the meantime, of the person elected as such, such officer shall be chosen on or before the third Wednesday in January next thereafter, from the people at large, by joint ballot of the senators and representatives, in one room[.]").

[105] Me. Const. art. V, pt. II, § 1 (Secretary of State); *id.* pt. III, § 1 (Treasurer); *id.* art. IX, § 11 (Attorney General).

[106] N.H. Const. pt. II, art. LXVII ("The Secretary and Treasurer shall be chosen by joint ballot of the Senators and Representatives assembled in one room.").

[107] Ed Kilgore, *Gardner Ekes Out a 22nd Consecutive Term as New Hampshire Election Chief*, N.Y. Intelligencer (Dec. 5, 2018), https://nymag.com/intelligencer/2018/12/new-hampshire-election-chief-gardner-wins-22nd-term.html [https://perma.cc.M7CM-5BJJ].

[108] *See* N.H. Const. pt. 2, arts. XXIV (Senate), XLII (Governor), LXI (Executive Council).

A and B are still alive and otherwise eligible to hold office, the legislature would be confined to choosing between A and B; they are the "two persons having the highest number of votes in the district."[109]

The General Court's decision to pick between A and B is entirely its own, and is subject to no appeal or judicial review, as the state supreme court has repeatedly explained.[110] While we might reasonably hope, or expect, that the Condorcet winner[111] or at *least* the candidate with the most votes will be selected, cynical realism may also suggest that the legislature will pick the candidates not based on voter intent, but instead on the candidate's party affiliation.

Regardless, suppose that the legislature picks A, and so Candidate A therefore becomes Senator A. Suppose again that Senator A dies before their term is up. Now the legislature will convene again, but this time it will be confined to choosing between B and C. That is, after A's death, B and C are then the "two persons having the highest number of votes in each district."[112] If the legislature picks B, and then Senator B dies, then the legislature would choose between C and D. Assuming a limitless number of candidates and a 100% mortality rate, this procedure would keep continuing.

To illustrate how a state senate vacancy in Maine might be filled, some context is required. Under the 1819 Constitution, Maine State Senators were elected in districts that were coterminous with counties. Larger counties elected more senators, so some districts were multi-member districts, while others were single-

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[109] *See* N.H. Const. pt. II (1784).

[110] *E.g.*, Brown v. Lamprey, 106 N.H. 121, 126 (1965) ("... Under Article 35 ... the Senate acted in a judicial capacity as the 'final judge' of the elections. In so doing it did not exceed its authority by determining the applicable law as well as finding the controlling facts. ... In the circumstances we conclude that under Article 35, Part II, of the Constitution, the action taken by the Senate on January 6, 1965 is final and beyond the power of this court to approve or disapprove."); *In re* Opinion of the Justices, 56 N.H. 570, 573 (1875) ("By Article XXXV of the constitution, the senate are made 'final judges of the elections, returns, and qualifications of their own members, as pointed out in this constitution.' We are of opinion that from the action of the senate in this respect there can be no appeal. By the express terms of the constitution, the action of the senate is made *final*.") (emphasis in original).

[111] "A candidate in an election who would defeat every other candidate in a head-to-head contest (with the winner declared by majority rule) is said to be a Condorcet winner." Jonathan K. Hodge & Richard E. Klima, The Mathematics of Voting and Elections: A Hands-On Approach 40 (2000).

[112] N.H. Const. pt. II (1784).

member districts.[113] Accordingly, in a district with more than one member, each party would nominate a number of candidates equal to the number of seats to be filled, and each voter casts one ballot with multiple votes. Consider the following hypothetical, which involves a state senate election in a two-member district:

| | | |
|---|---|---|
| Candidate A | 2,750 votes | 55% |
| Candidate B | 2,000 votes | 40% |
| Candidate C | 1,750 votes | 35% |
| Candidate D | 1,500 votes | 30% |
| Candidate E | 1,250 votes | 25% |
| Candidate F | 750 votes | 15% |

Candidate A, who has received a majority of the vote, is elected. But because no other candidate won a majority of the vote, there's a vacancy. Accordingly, like in the cases of Massachusetts and New Hampshire, the Maine Legislature would meet in a joint convention to fill the vacancy. Assuming that both Candidates B and C are still alive and otherwise eligible to hold office, the legislature would be confined to choosing between B and C; they are the "highest number of the persons voted for, on said lists."[114] Again, the legislature's choice of the two candidates is its own, and any mid-session vacancies are filled by cycling down the list of otherwise-unsuccessful candidates.

In all three states' systems, there are some obvious pitfalls. What if there aren't *two* candidates with the highest number of votes, but more? As unlikely as it is, what if there's a three-way tie? Or a two-way tie for second place? On the other hand, what if there is only *one* candidate with the highest number of votes—that is, only two candidates ran in the district and the winner vacated their seat? These scenarios may be unlikely to develop in most cases, but given the practical consequences of the outcome—whether and how a district, filled with people affected by the state government's decisions, will be represented—the answers to these questions mattered.

The 1816 New Hampshire General Court had an opportunity to address what happened if there were more or fewer candidates than two, and its solution was somewhat unsatisfying. Vacancies occurred in both the 5th and 6th Districts. In the 6th, the remaining candidates were Stephen Moody (1,585 votes), Asa Crosby (1

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[113] *See* KENNETH T. PALMER, MAINE POLITICS AND GOVERNMENT 69–70 (1992); *see also* ME. CONST. art. IV, pt. 2, § 2 (1819) ("The Legislature . . . shall . . . cause the State to be divided into districts for the choice of senators. The districts shall conform, as near as may be, to county lines, and be apportioned according to the number of inhabitants."). This multimember–single-member district combination was not required by the constitution, as its text makes clear.

[114] ME. CONST. art. IV, pt. II, § 5 (1819).

vote), and Samuel Shepard (1 vote).[115] A senate committee concluded that because Crosby and Shepard each had one vote, creating a two-way tie for second place, "there appears therefore, to be no two highest numbers . . . consequently no constitutional candidates from whom a Senator may be elected to fill the vacancy in said district."[116] Similarly, in the 5th District, there were *four* remaining candidates: Jonas C. March (1,513 votes), Stephen Moody (7 votes), Nathaniel Upham (1 vote), and Jeremiah H. Woodman (1 vote).[117] The General Court subsequently determined that Moody, the Federalist candidate in the 6th District, didn't live in the 5th District and was therefore ineligible to serve—which then created a two-way tie for second place between Crosby and Shepard. The Senate *again* concluded that there weren't two *highest* numbers because they were *equal*.[118] Accordingly, the Senate voted 6–4 against convening with the House to fill the vacancies.[119]

The Federalist State Senators objected and lodged a protest against the proceedings, which they argued were "not only unprecedented but unconstitutional and hostile to the principles of a free government." The group argued that the Senate's recapitulation of the election results was incorrect and that there were candidates able to fill the vacancies. In any event, it concluded that the constitution's requirement of twelve senators, and its procedure for filling the vacancies, required a solution. With regard to the two candidates who received one vote each in District 6, they concluded,

> When the people have presented us with two persons, equal in their estimation, we violate no principle of the constitution, by selecting either. Although *equal*, as it respects themselves, they are *both*, and *each* of them *highest*, as it respects every body else: And *each*, or *either*, of them, may be taken by the convention, as a proper candidate. It is a new kind of logic, and such as we do not understand, that because two of three candidates have an equal number of votes, therefore no choice can be made!

Perhaps as an alternative, they argued that the ineligibility of a candidate for office didn't impact their ability to *win* that office, merely their ability to *hold* it, citing a case from 1813 in which a vacancy was filled by an ineligible person.[120]

Both the Maine Legislative and the Massachusetts General Court proved themselves to be less rigidly doctrinal with their selection processes than the New Hampshire General Court. Admittedly, with multi-member districts, the sort of

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115 S. J., Gen. Sess. 51 (N.H. 1816) [hereinafter 1816 Senate Journal].

116 *Id.*

117 *Id.* at 74.

118 *Id.*

119 *Id.* at 75.

120 *See id.* at 122–27.

situation that presented itself in New Hampshire—a mid-session vacancy with a tie among the remaining candidates because they each received one vote—was unlikely to present itself in either state. However, there are a handful of comparable circumstances.

For example, in 1848, a vacancy in the Massachusetts State Senate from Suffolk County occurred following Senator George Bigelow's resignation. The ordinary procedure required the General Court to choose between the next two candidates with the highest number of votes, but the Senate Elections Committee concluded that this was impossible because there was a tie for second place. James Cheever was the first runner up, with 2,963 votes, and both John Pierce and Isaac Adams received 2,953 votes. Accordingly, the Committee concluded that it was "unable to comply with the strict *letter* of the law by returning '*twice* the number of senators wanted to fill the vacancy[.]'" [121] Nonetheless, the Committee concluded that "under these circumstances, they consider that the spirit and intent of the constitution will be complied with by returning" the three names instead of just two.[122]

Maine encountered a similar issue in 1855—but in resolving its gubernatorial election, not a state senate election. Maine also required gubernatorial candidates to receive a majority of the vote to be elected. If no candidate did, the House of Representatives would take the four candidates with the highest number of votes and narrow it down to two; the Senate would then pick one of them.[123] In the 1855 gubernatorial election, there weren't *four* candidates who received the highest number of votes—instead, because of a tie for fourth place, there were *five* candidates. [124] But rather than quibbling about whether the tied fourth-place candidates were eligible, the Legislature considered, apparently without much controversy, the top *five* candidates the "Constitutional Candidates from which a Governor is to be elected by the Legislature."[125]

### *B. Selection Patterns*

But beyond the mechanics of how the constitution provided for filling senate vacancies, how were the vacancies actually filled? This Section answers this question

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121 S. Rep. 101, at 2 (Mass. 1848) (quoting Mass. Const. pt. II, ch. 1, § 3 (1780)).

122 *Id.*

123 Me. Const. art. V, § 3 (1819) ("But if no person shall have a *majority* of votes, the House of Representatives shall, by ballot, from the persons having the four highest numbers of votes on the lists, if so many there be, elect two persons and make return of their names to the Senate, of whom the Senate shall, by ballot, elect one, who shall be declared the Governor.") (emphasis added).

124 S. J., 35th Leg., 1st Reg. Sess. 14 (Me. 1856).

125 *Id.*

in two separate ways. First, to set the stage for which candidates were ultimately selected to fill vacancies, it explores how often vacancies occurred and during which periods of time; second, it considers the characteristics of the average candidate selected to fill a vacancy, in terms of their partisan affiliation and their election performance.

1. Frequency of Senate Vacancies

Before addressing state- and party-specific membership patterns in how state senate vacancies were filled, it is helpful to provide a brief overview of the frequency of vacancies over time. Beginning in the 1780s when they adopted their constitutions, both Massachusetts and New Hampshire experienced a relatively high frequency of state senate vacancies, which were primarily caused when no candidate in a county or district received a majority of the vote. A majority of the New Hampshire State Senate was routinely elected by the General Court in the 1780s and early 1790s, but as the turn of the century approached, vacancies decreased. The Massachusetts State Senate was never so indirectly elected; it hit a peak of 40% indirect selection in 1787. As mentioned previously, given the absence of formal political parties at this point, this high vacancy rate makes sense.

As parties developed and as people organized themselves into the Federalist or Democratic–Republican parties, both states saw their vacancy rates fall precipitously. Though they still remained high in the 1790s, by the early 1800s—when the two parties had unequivocally established themselves—vacancies had fallen below 10%.

Vacancies remained this low for the remainder of the First Party System, which lasted until the 1820s. In 1819, Maine joined the Union as a separate state, adding a third comparator. As the First Party System disintegrated—and as the Federalist Party receded everywhere in the nation but Massachusetts[126]—vacancies grew. The Second Party System, dominated by the Democratic and Whig parties, would soon take the First's place. However, the two parties hadn't established themselves by the 1820s, and both voters and politicians organized themselves by virtue of their affiliation with John Quincy Adams or Andrew Jackson.[127] In the context of this unsettled ground, the increase in vacancies makes sense. Once the parties established themselves, vacancies in Maine and New Hampshire declined in the late

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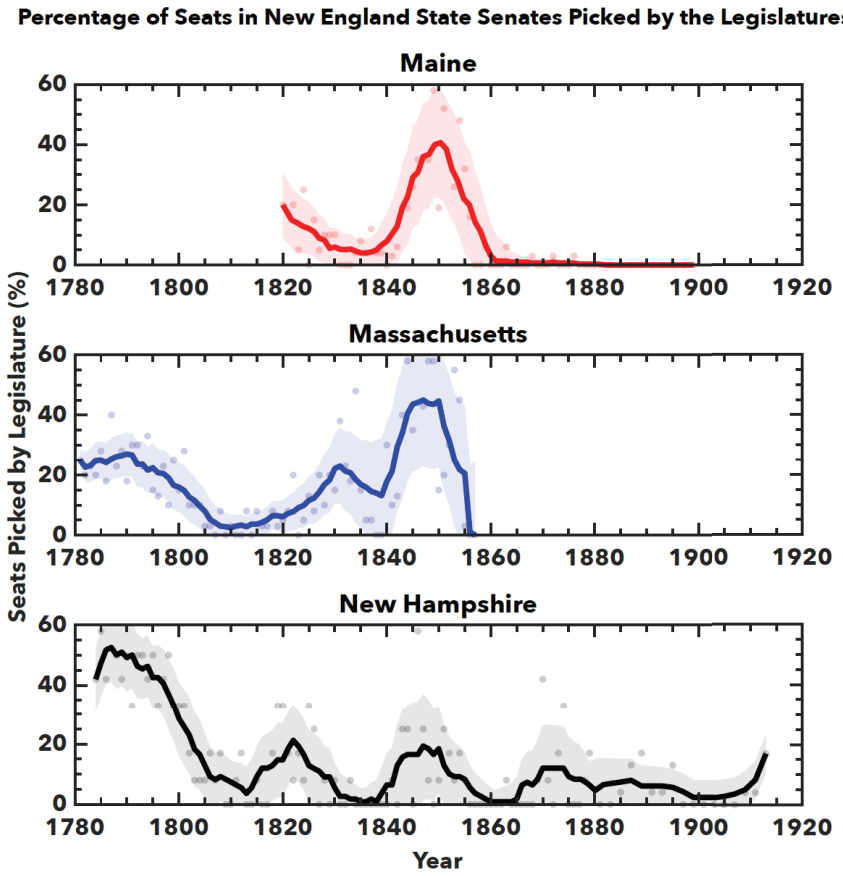
[126] Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840 200 (1970).

[127] *See, e.g.*, Michael F. Holt, The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War 7–18 (2003); Jonathan Earle, *Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817–1849*, 4 Mass. Hist. Rev. 60, 66–68 (2002).

1820s and the 1830s.




But not in Massachusetts. Unlike its neighbors, it saw the brief presence of third parties—the Middling Interest Party in the early to mid-1820s[128] and the Anti-Masonic Party in the late 1820s to mid-1830s[129]—drive up the frequency with which state senate elections failed to produce a majority winner. Massachusetts, therefore, saw a considerable, but brief, increase in its number of state senate vacancies. This

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[128] *See generally* Andrew R. L. Cayton, *The Fragmentation of "A Great Family": The Panic of 1819 and the Rise of the Middling Interest in Boston, 1818–1822*, 2 J. OF THE EARLY REPUBLIC 143 (1982) (discussing the Middling Interest). The term "Middling Interest" was adopted by the upper-middle-class supporters of the movement and party "to distinguish themselves from both the mercantile elite and unstable lower elements." *Id.* at 147.

[129] Lauri Buonanno Lanze, *Anti-Masonic Party, 1826–1830s*, *in* 1 THE ENCYCLOPEDIA OF THIRD PARTIES IN AMERICA 172, 176 (Immanuel Ness & James Ciment eds., 2000); WILLIAM PRESTON VAUGHN, THE ANTI-MASONIC PARTY IN THE UNITED STATES: 1826-1843 126 (1983).

increase had faded by the mid-1830s, and vacancies became relatively infrequent for some time.

By the early to mid-1840s, however, all three states experienced dramatic increases in senate vacancies. The growth of the abolitionist Liberty Party frequently served to prevent majority winners in senate districts, even as the Party won few legislative elections itself.[130] With more senate elections thrown to the legislature and with a handful of Liberty Party legislators occasionally proving decisive, the Party was able to achieve an outsized influence.[131]

The Liberty Party faltered in the late 1840s,[132] and senate vacancies briefly decreased. But it was soon replaced by the more moderate Free Soil Party, which did even better.[133] Repeatedly strong performances by "Free Soilers" created a number of vacancies rivaling the period of time preceding the First Party System and allowed multi-party governing coalitions to form, which filled the vacancies with their own members.[134]

From here, vacancies largely declined. The Free Soil Party merged with anti-slavery Whigs and Democrats—along with the nationalist, xenophobic, Know Nothing Party—to form the Republican Party,[135] thereby restoring the two-party balance and ushering in the Third Party System. By 1860, Massachusetts had

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[130] Earle, *supra* note 127, at 75–76 (discussing the rise of the Liberty Party in Massachusetts); Reinhard O. Johnson, *The Liberty Party in Maine, 1840–1848: The Politics of Antislavery Reform*, 19 ME. HIST. SOC'Y Q. 135, 143–44, 146 (1980) (discussing the rise of the Liberty Party in Maine); *see generally* Richard H. Sewall, *John P. Hale and the Liberty Party, 1847–1848*, 37 NEW ENG. Q. 200 (1964) (discussing the Liberty Party in New Hampshire).

[131] *Infra* notes 228-230, 232, and accompanying text (discussing coalitions involving the Liberty Party). *But see* Johnson, *infra* note 231, at 146 (noting that the Maine Liberty Party was largely opposed to joining governing coalitions).

[132] John C. Berg, *Liberty Party: 1840–1848*, *in* 2 THE ENCYCLOPEDIA OF THIRD PARTIES IN AMERICA 344, 346–47 (Immanuel Ness & James Ciment eds., 2000).

[133] *See, e.g.*, FREDERICK J. BLUE, THE FREE SOILERS: THIRD PARTY POLITICS, 1848–54 152–72 (1973) (discussing the promising position of the Free Soil Party, and its potential for longer-term power, in the late 1840s).

[134] *Infra* notes 233-242 and accompanying text (discussing coalitions involving the Free Soil Party). Massachusetts, however, experienced a slight decrease in senate vacancies—at least, relative to the 1840s—despite the increasing prominence of the Free Soil Party. The easiest explanation is that, in the early 1850s, even prior to the 1851 coalition between the Democrats and the Free Soilers, the two parties worked together and jointly nominated legislative candidates, BLUE, *supra* note 133, at 214–17, 227, which assuredly decreased the number of vacancies.

[135] *See, e.g.*, TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S 246–61 (1992); WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856 239–73 (1987).

abolished both its majority requirement and its method of filling state senate vacancies.[136] For the remainder of the century, neither Maine nor New Hampshire experienced periods of time in which senate vacancies consistently rose. There were brief periods when vacancies increased, which was caused by third parties—the Labor Reform Party in the early 1870s in New Hampshire[137] and the Greenback Party in the late 1870s in Maine.[138] In the late 1870s, following a contested gubernatorial election and debatable control of the legislature, Maine also abolished its majority requirement.[139] New Hampshire required special elections to fill senate vacancies beginning in 1889, but retained the majority requirement and legislative selection when no candidate won a majority.[140] Maine required special elections beginning in 1899.[141] New Hampshire similarly tossed both its majority requirement and its legislative selection procedure in 1913. Though New Hampshire approved the change in 1912, it didn't take effect until the 1914 election,[142] which allowed a brief, and final, increase in senate vacancies because of the strong performance of the Progressive Party in 1912.[143]

### 2. Characteristics of Successful Candidates

More than 1,000 candidates were chosen to fill senate vacancies in Maine, Massachusetts, and New Hampshire during their periods of quasi-indirect election. Who were the people selected? There are two obvious ways to look at the available data to answer this question. First, because all candidates selected to fill a vacancy in a district ran in an election in that district, how did the successful candidates do relative to the unsuccessful? Second, what is the relationship between partisan affiliation and selection? Is a Republican-controlled legislature likelier to pick a

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136 Yeargain, *supra* note 22, at 580–82.

137 Lex Renda, Running on the Record: Civil War-Era Politics in New Hampshire 173 (1997). For a greater discussion of the Labor Reform Party, *see* Myra Burt Adelman, *Labor Reform Party: 1872*, *in* 2 The Encyclopedia of Third Parties in America 321, 321–22 (Immanuel Ness & James Ciment eds., 2000).

138 Peter H. Argersinger, *Greenback Party: 1873–1886*, *in* 2 The Encyclopedia of Third Parties in America 271, 273–75 (Immanuel Ness & James Ciment eds., 2000).

139 Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 163–69 (2016); Mark Wahlgren Summers, Party Games: Getting, Keeping, and Using Power in Gilded Age Politics 107–10 (2004).

140 Yeargain, *supra* note 22, at 584–86.

141 *Id.* at 586–87.

142 *See id.* at 585.

143 James Wright, The Progressive Yankees: Republican Reformers in New Hampshire, 1906–1916 142–43 (1987).

fellow Republican to fill a vacancy? Each of these questions is considered in turn.

*a. Relationship Between Popular Vote and Vacancy Selection*

We first consider the relationship between a candidate's performance and the subsequent likelihood of their selection to fill a vacancy. Put another way, do candidates who did "well" in the election—perhaps missing the majority threshold by just a small margin—have a higher likelihood of being selected to fill the vacancy? If the state legislature were concerned with matching voter intent with the candidate selected to fill the vacancy, we might expect some relationship between "doing well" in an election and being selected to fill a vacancy.

But successful candidates (that is, those selected by the convention to fill the vacancies) and unsuccessful candidates aren't distinguishable based on their electoral performance. Winning a plurality of votes in the initial election had no meaningful relationship to being selected to fill the vacancy. In New Hampshire, between 1788 and 1913,[144] 60.65% of plurality winners were ultimately selected to fill vacancies. The outcomes in Maine are similar, but slightly more optimistic for plurality winners: between 1820 and 1875,[145] 62.3% of plurality winners were selected to fill vacancies. Unfortunately, because the available data is insufficient to analyze Massachusetts Senate vacancies, no observations are available in that respect.

Digging deeper into the data paints a similarly ambiguous picture. The median vote percentage of a candidate selected to fill a vacancy was only 47.47% in New Hampshire[146] and 45.58% in Maine, and their average vote percentage was 45.61% in

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[144] Because of the practical unavailability of election data for some of the years encompassed in this range, this overall number may be slightly larger or smaller than it is reported here. Specifically, election results are not available for some early years—1784–87, 1795, and 1798–99—and from 1825–32. 1833 was the first year in which a Senate vacancy occurred from failure to elect for which election results were reported in Senate Journals. A joint venture between the American Antiquarian Society and Tufts University, which collects and reports a significant amount of election results prior to 1833, allows for the consideration of pre-1825 elections in the absence of legislative reports. *See* TUFTS UNIV.: A NEW NATION VOTES: AMERICAN ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/ [https://perma.cc/8UQU-WZBX] (last visited Apr. 30, 2020). However, the excluded years mentioned *supra* do not have vote totals for the candidates elected to fill vacancies.

[145] Maine abolished its majority requirement for state senate elections in 1875. TINKLE, *supra* note 17, at 71. This calculation excludes 50 Maine Senate vacancies between 1837–1839 and 1850–1854, for which election results are not readily available.

[146] Because the pre-1825 election results available through *A New Nation Votes* do not always include "total votes," the calculation for New Hampshire is only from 1825 to 1913. *See* TUFTS UNIV.: A NEW NATION VOTES: AMERICAN ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/ [https://perma.cc/8UQU-WZBX] (last visited Apr. 30, 2020).

New Hampshire and 44.05% in Maine. But solely looking at *selected* candidates obscures the picture—while their percentage, by either metric, is relatively low, any percentage will necessarily be below fifty percent because these were elections in which no candidate received a majority. Therefore, we should also consider the candidates who were *not* selected. The median vote percentage of a candidate *not* selected to fill a vacancy was 47.12% in New Hampshire and 43.47% in Maine, and their average vote percentage was 44.91% in New Hampshire and 44.56% in Maine.

In other words, in New Hampshire, selected candidates had both a higher median and mean vote share than not-selected candidates. And in Maine, selected candidates had a higher median vote share, but a lower mean vote share, than not-selected candidates. But those differences aren't much; selected candidates' median vote percentage was just 0.35% greater than not-selected candidates' median in New Hampshire and 2.11% greater in Maine, and their average vote percentage was just 0.70% greater in New Hampshire and 0.51% *less* in Maine.

Moreover, there is no correlation between the popular vote won by a selected candidate and the percentage of the legislative vote that they received. Calculating the correlation of the selected candidates' popular vote (the percentage of the vote that they received in the election) and their legislative vote (the percentage of the vote that they received in the legislature's joint convention) results in an r-squared value[147] of just 0.0322 in New Hampshire and 0.002 in Maine, which suggests that there is either a very weak correlation or none at all.[148] Put plainly, there's no relationship between a selected candidate's popular vote share and their convention vote share. This is somewhat surprising. Though we wouldn't expect that a selected candidate receiving, say, 47% of the vote to receive 47% of the legislative vote—indeed, if they did, they wouldn't be a successful candidate!—we might reasonably expect that a candidate whose percentage of the vote is closer to 50% is likelier to be selected. But the data doesn't support that conclusion.

Of course, the above is solely concerned with vacancies caused by failure to elect when the top two candidates are both eligible to fill the vacancy. Session vacancies, which are caused by resignation, death, or something similar, were excluded from the above calculations, as were failure-to-elect vacancies presenting the rare case in which one of the top two candidates died between the election and the legislative

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[147] An r-squared value "may be interpreted as *the proportion of reduction in the variance of Y attributable to our knowledge of X*. In other words, $r^2$ is the proportion of variance in Y that is predictable (or explainable) on the basis of X." Craig Leonard Brians, Empirical Political Analysis 309 (2016) (emphasis in original).

[148] Carol T. Fitz-Gibbon et al., How to Analyze Data 82 (1987) (noting that an r-squared value of 0.00 indicates "probably no correlation, just chance.").

session. Because those sorts of vacancies could only be filled by the remaining two candidates, who may well be the second- and third-place finishers, including them in the above dataset would unavoidably skew the results. They are considered separately here.

Between 1813 and 1913,[149] eight such vacancies occurred and were filled in New Hampshire.[150] In five of those cases, the legislature picked the third-place finisher. For an illustration of what this looked like in practice, consider the following example. In 1871, Democrat Samuel P. Thrasher was elected to the New Hampshire State Senate from District 10:[151]

| | | |
|---|---|---|
| Samuel P. Thrasher | 2,595 | 50.16% |
| Albina Hall | 2,567 | 49.62% |
| Alvah Smith | 4 | 0.08% |
| All others | 7 | 0.13% |

However, after he was elected—but before the legislature convened—Thrasher died.[152] Accordingly, the two eligible candidates were Albina Hall and Alvah Smith. Both were Republicans, but Smith apparently promised House Democrats "that he 'would vote as Mr. Thrasher would have voted,'" and a House Democratic leader vouched for Smith as "worthy of the vote of every Democrat and Labor Reformer."[153] Accordingly, House Democrats, who had formed a slim majority with the Labor Reform Party, directed their members to vote for Smith over Hall.[154] At the joint convention, Smith was narrowly elected.[155]

| | | |
|---|---|---|
| Alvah Smith | 167 | 50.91% |
| Albina Hall | 161 | 49.09% |

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149 1813 was the first year in which a Senate vacancy occurred from a session vacancy for which election results were readily available. However, data is unavailable for 1824, a year in which there was a session vacancy. *See* APPENDIX C.

150 Again, this number *only* includes vacancies that were actually filled. It is undoubtedly the case that more vacancies occurred, but if they occurred after the month-long general session, they were only noted in the Senate Journals if a special session occurred.

151 N.H. SEC'Y OF STATE, VOTES FOR STATE OFFICERS: 1868 TO 1878. Because most Maine State Senators were elected in multi-member districts and because Maine Senate Journals frequently failed to report vote totals for unsuccessful candidates, a similar analysis is difficult to conduct.

152 H. J., Gen. Sess. 67 (N.H. 1871) [hereinafter 1871 House Journal].

153 *"Drift"ings from Concord*, NASHUA DAILY TEL., June 12, 1871, at 1–2 [hereinafter *"Drift"ings*, June 12].

154 *Id*.

155 1871 House J., *supra* note 152, at 67.

Ultimately, the cumulative effect of this analysis provides strong support for the conclusion that vacancies were not filled based on a candidate's performance in an election. Less than half of plurality winners were selected to fill vacancies, though both the median and average appointee received a higher percentage of the vote than the median and average unsuccessful candidate. Moreover, there is no correlation between a candidate's popular vote share and their convention vote share. And when other vacancies occurred, the legislature was likelier than not to pick the *third*-place candidate to fill the vacancy. So, what *does* determine the likelihood of selection? Analyzing the partisan affiliation of the legislature and the appointees may provide a better answer.

*b. Partisan Affiliation*

This subsection starts with a potentially cynical assumption: When given boundless discretion in filling legislative vacancies, legislators will ultimately base their decisions on how they can best benefit their party. But this assumption need not be *entirely* cynical: looking to the eligible candidates' partisan affiliation is a rational heuristic if legislators are looking to pass legislation consistent with their ideology. Filling a legislative vacancy is a zero-sum game. If a Republican is selected to fill the vacancy, it means that a Democrat wasn't selected, and vice-versa. In a legislative body of just twelve members in New Hampshire, filling even *one* vacancy could alter the body's composition in a meaningful way—it could switch it from one party to another, deprive a party of a veto-proof majority or a supermajority, or narrow the gap between the parties to make it easier to defeat disfavored legislation. The stakes, therefore, matter—and there's no reward for altruism. Even if the parties agreed on a set of unspoken norms—like promising to always elect the candidate with the most votes, regardless of their party affiliation—those norms would be weak. And when the state legislature sees high turnover, it would be challenging to get newer members to stick to voluntary norms that were made by their unknown predecessors and handicap their party's agenda. Additionally, all three states saw many different parties form governing coalitions in the late eighteenth and nineteenth centuries.[156] So even if two parties reached a gentleman's agreement[157] to pick plurality winners to fill vacancies, there's no guarantee that

[156] Ten different parties—Democratic–Republicans, Federalists, Democrats, National Republicans, Whigs, American, Republican, Liberty, Independent Democrats, and Free Soil—formed governing majorities in the State House from 1784 to 1913. *See* DUBIN, *supra* note 25, at 120–22 (detailing party composition of the New Hampshire General Court from 1796 to 1913).

[157] And, because the first women were elected to the General Court only in 1920, it would indeed have been a *gentleman's* agreement. *See* 1 DORIS WEATHERFORD, WOMEN IN AMERICAN POLITICS: HISTORY AND MILESTONES 90 (2012).

their promise would continue when the parties changed. Accordingly, it would be entirely rational and altogether predictable for legislators to look to the party affiliation of the eligible candidates in deciding how to fill a vacancy.

The core assumption that legislators would vote to fill senate vacancies with members of their own party is strongly supported by the available data. With respect to the influence of partisanship on voting, it is helpful to break down the periods of time in which these three states filled state senate vacancies through legislative election. As mentioned previously, political parties did not exist in any recognizable form prior to the ratification of the Constitution in 1789,[158] and some political scientists have argued that political parties didn't form in any modern sense until the late 1790s or even the early 1800s.[159] The development of American political parties has generally been broken down into numbered "party systems," with the First Party System (dominated by Federalists and Democratic–Republicans) lasting from the 1790s to the 1820s, the Second Party System (dominated by Democrats and Whigs) lasting from the late 1820s to the mid-1850s, the Third Party System (dominated by Democrats and Republicans) lasting from the mid-1850s to the 1890s, and the Fourth Party System lasting from the 1890s to the 1930s.[160]

Between 1796 and 1821—a period of time roughly corresponding with the First Party System—about 159 state senate vacancies occurred in Massachusetts and New Hampshire. Of the candidates selected to fill those vacancies, party affiliation is available for 108 of them.[161] In 95 of those 108 selections, or about 88% of the time, the legislature selected the candidate affiliated with the majority party in the state house. That leaves thirteen cross-party exceptions, virtually all of which occurred because the legislature was restricted to choosing from two opposition party candidates.[162] Little additional information exists about these vacancies, and there was little recorded drama in how they were filled.

This trend continued in the Second Party System, during which time substantially more information is available. Between 1833 and 1856, the height of the

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158 *Supra* notes 49-53 and accompanying text.

159 E.g., Ronald P. Formisano, *Deferential-Participant Politics: The Early Republic's Political Culture, 1789–1840*, 68 Am. Pol. Sci. Rev. 473, 475–78 (1974).

160 Harold F. Bass, Jr., Historical Dictionary of United States Political Parties 8–10 (3d ed. 2020).

161 This includes 89 vacancies Massachusetts from 1796 to 1824 and 30 vacancies in New Hampshire from 1801 to 1821. Though Maine filled 14 senate vacancies during the early to mid-1820s, party affiliation is not available for those selected and it is excluded from this discussion. *See* Appendix A.

162 *See* Appendix D.

Second Party System, the Massachusetts and New Hampshire legislatures filled a combined 314 senate vacancies, for which party affiliation of the selected candidates is available in 306 cases. In 281 of those cases, or about 92% of the time, the legislature selected state senate candidates who were affiliated with the majority party (or governing coalition) in the legislature.[163] And the individual circumstances of the 26 documented exceptions make clear that they were motivated by the specific contexts of those legislatures and the vacancies at issue—not any sense of bipartisan spirit. For example, ideological schisms in the majority party over local issues, like alcohol regulation, led to some cross-party selection.[164] In several other years, multi-party coalitions, which were of varying durability, complicated the vacancy-filling process. This sometimes occurred because third-party legislators were able to swing the convention vote toward their preferred outcome,[165] and sometimes because a strong performance by three parties in a given district limited

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[163] This includes 282 vacancies in Massachusetts from 1834 to 1854, and 24 vacancies in New Hampshire from 1833 to 1855. Unfortunately, because Maine legislative journals do not list the party affiliation of their members, and because few antebellum Maine newspapers that survive discuss the party affiliation of Maine state legislators, there is not enough data to meaningfully discuss the influence of party on how Maine State Senate vacancies were filled.

[164] *Massachusetts Legislature*, FALL RIVER MONITOR, Jan. 18, 1840, at 1 ("A portion of the Whigs voted against 4 of the Whig candidates from Worcester County, and 1 from Middlesex, on account of their views in relation to the license law."); *General Court*, LIBERATOR (Boston), Jan. 16, 1852, at 3 ("*Bristol*—Oliver Ames, Jr., Whig, was elected over Nicholas Hathaway, Democrat. It is said that the position of Mr. Hathaway was not satisfactory to the Temperance Free Soilers [in the majority coalition].").

[165] In the 1843 Massachusetts General Court, for example, Whigs held a nominal 2-seat majority in the State House over the Democratic Party and Liberty Party state representatives. DUBIN, supra note 25, at 92. However, a single Whig State Representative, Charles C. Bell, joined forces with the Democratic and Liberty Party legislators to elect fifteen Democrats and one Whig to the State Senate. Jonathan Earle, *Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817–1849*, 4 MASS. HIST. REV. 60, 75 (2002). The Whigs were quite peeved by this. They raised concerns at the time that Bell had been bribed by Democratic knaves with a suit of clothes, $400, and a commission as a justice of the peace. *The Collins Bribe Out Bribed*, FALL RIVER MONITOR, Oct. 28, 1843, at 2. The next year, when they regained their majority in the General Court, they directed the House Judiciary Committee to investigate the bribery allegations and to make recommendations regarding Bell's impeachment as a justice of the peace or his criminal prosecution. The Committee issued a report protesting the directive, but ultimately concluded that, though Bell was appointed a justice of the peace by the governor, he never assumed the post, and that the committee therefore had no jurisdiction to recommend articles of impeachment or prosecution. *See generally* H. REP. NO. 24 (1844).

the majority coalition's choices in filling senate vacancies.[166] Relatedly, sometimes the multimember election process meant that the majority had to choose among opposition party candidates.[167]

And though Massachusetts abolished both its majority requirement and its use of appointments to fill state senate vacancies in 1860, the process continued in New Hampshire until 1913. Between 1863 and 1913, a period of time corresponding with the Third and Fourth Party Systems, 44 state senate vacancies were filled by the New Hampshire General Court. Of those, 39 were filled by members of the majority party or coalition.

With regard to the five exceptions, the majority only chose a non-majority party candidate because they were forced to choose between a member of the opposition party or a third-party candidate. In two of those cases—in 1883[168] and in 1903[169]—the majority opted to select the opposition-party candidate over a more ideologically extreme third-party candidate. But in 3 cases—in 1869, 1871, and 1885—the majority opted for the mystery choice behind Door Number 3. That meant selecting a candidate who received just 14 votes and who ran for re-election as a member of the

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166 *Mass. Legislature*, Fall River Monitor, Jan. 11, 1851, at 2 ("As no democrat had as many votes at the last election as the whig [in the Middlesex County Senate district], their candidate could not be presented [to the joint convention], and the locos [Democrats] had to vote for a whig.").

167 *Id.*; *Returns of Votes for Senators*, Pittsfield Sun, Dec. 31, 1835, at 1 ("There are 2 vacancies, both of which are in Essex. One of these vacancies must be filled by a Democrat.").

168 After Republican State Senator Daniel Dinsmoor died, the Republican General Court opted to fill his seat by picking Jonathan Taylor, the Democratic nominee, over David Shaw, the Greenback Party nominee, who had won just 4 votes. The *Boston Globe* noted that Republicans, given their sizable majority in both chambers, "can well afford to be magnanimous and elect a Democrat to this vacancy." *The Organization of the Two Branches Still in Much Doubt*, Boston Globe, May 14, 1883, at 2. However, the legislative record makes clear that many Republican legislators weren't in a magnanimous mood—Taylor was elected over Shaw by a vote of 173–103. H. J., 1st Reg. Sess. 434–35 (N.H. 1883).

169 In 1903, no candidate received a majority of the vote in the 24th District. Though the two eligible candidates would've been Republican Joseph Gardiner and Democrat Calvin Page, Gardiner died after the election. Accordingly, the eligible candidates were Page and Independent Labor nominee Ira Seymour. S. J., 1st Reg. Sess., 11–12 (N.H. 1903). At this time, labor parties were affiliated with socialism, and it is likely that the Republican General Court picked Page over Seymour because he was more ideologically in line with them. *See, e.g.*, Morris Hillquist, History of Socialism in the United States 248–49 (1910); Robert Hunter, Labor in Politics 19–20 (1915); *Joint Meeting in New York*, Social Democratic Herald, Sept. 16, 1899, at 3 ("A joint meeting of the branches of the Social Democratic Party of New York was held . . . for the purpose of taking action on the invitation extended to the S.D.P. by the newly organized Independent Labor Party of New York to send delegates to its conference.").

majority party (Cyrus Taylor, 1869);[170] selecting a perennial candidate who won just 4 votes and who was a former member of the opposition party (Alvah Smith, 1871);[171] and the Prohibition Party nominee, who became the *only* Prohibition Party candidate to ever serve in the New Hampshire General Court (Frank G. Thurston, 1885).[172]

### *C. Controversies and Challenges*

During the combined 208 years in which the Massachusetts General Court, Maine Legislature, and New Hampshire General Court were empowered to fill state senate vacancies by convention vote, the procedure routinely came under fire for how it played out in real time. Some of the objections related to how vacancies were filled in individual cases, even where the outcome would not have altered the composition of the chamber; others were objections that were more focused on more fundamental concepts that did, or that could have, altered the chamber's position. This section is divided into four brief subsections: (1) individual objections to decisions to *not* fill vacancies; (2) objections to how vacancies were determined; (3) how vacancies were filled; (4) how coalitions of different parties formed majorities in the three states' legislatures and filled vacancies.

#### 1. Decisions to *Not* Fill Vacancies

For the most part, if a vacancy occurred, the legislature would convene a convention and fill it. However, there are three separate instances in which vacancies either weren't filled or were proposed to not be filled. The first took place in New Hampshire in 1816, as mentioned previously, when the Democratic-Republican Senate majority refused to fill two Senate vacancies because the otherwise-eligible candidates were tied in votes and were therefore not the candidates with the "highest" vote totals.[173] While the Democratic-Republicans had

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[170] S. J., 1st Reg. Sess. 21 (N.H. 1869) (noting Taylor's election); GEORGE E. JENKS, THE NEW HAMPSHIRE REGISTER AND POLITICAL MANUAL FOR THE YEAR 1871 94 (McFarland and Jenks, Concord, 1871) (noting that Taylor ran for re-election as a Republican).

[171] For a greater discussion of Smith's selection, *see supra* notes 151-155, *infra* notes 250-254, and accompanying text.

[172] *Senator Morrill's Successor*, BOSTON GLOBE, July 14, 1885, at 4 ("In joint convention this morning the Legislature elected Frank G. Thurston, Prohibitionist, senator to fill the vacancy in the Nashua district, he receiving 157 votes, and Elbridge P. Brown, Democrat, 128."); see also DUBIN, supra note 25, at 120–23 (noting that no Prohibition Party legislators served in the General Court).

[173] *Supra* notes 115-120 and accompanying text.

a sizable majority in both chambers at the time,[174] their ability to select the candidate of their choice may have been illusory. In both districts, had the General Court elected to fill the vacancies, it would have been stuck with choosing a Federalist replacement for a Democratic-Republican legislator, which would've tied control of the chamber.[175]

A similar situation took place in Maine in 1830. That year, when the legislature convened following the 1829 elections, it was close-to-evenly split between the Democrats and the National Republicans (or anti-Jacksonians). In the Senate, this was especially true—the chamber was perfectly split between the two parties, 8–8, with 4 Senate vacancies.[176] The National Republicans in the Senate moved to convene with the State House, which they controlled at that time by a narrow margin, to fill the Senate vacancies.[177] However, the Democrats refused to do so—perhaps hoping to hold off on filling the vacancies until control of the House was

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[174] Dubin, *supra* note 25 at, 120 (noting that, in 1816, the Democratic–Republicans had an 8–4 majority in the State Senate before the vacancies and a 105–84 majority in the State House).

[175] In District 6, this was obviously the case—the General Court would've been restricted to choosing among Stephen Moody, the Federalist nominee in the district, or Asa Crosby or Samuel Shepard, who each received one vote. *New Hampshire 1816 State Senate, District 6:* Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/fq977w18t [https://perma.cc/7A67-CRPN]. But Crosby and Shepard were also Federalists. *See New Hampshire 1818 State Senate, District 6:* Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/qb98mf627 [https://perma.cc/3BBK-3UT9]. The situation in District 5 was less clear-cut. There, the top two candidates were Jonas C. March, the Federalist candidate, or Stephen Moody, the Federalist candidate from District 6 who nonetheless received 7 votes. *1816 State Senate, District 5:* Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/0z708x12d [https://perma.cc/R2WM-LUSH]. However, since the General Court determined that Moody didn't live in District 5, 1816 Senate Journal, *supra* note 115, at 74, the choice then would've been among March, the Federalist nominee, or Nathaniel Upham or Jeremiah Woodman, who each received 1 vote. Woodman was a Federalist. *1818 State Senate, District 5:* Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/k930bz46n [https://perma.cc/ETE6-LM5X]. Upham was a fairly prominent Democratic–Republican politician, but he had just been elected to Congress, Donald B. Cole, Jacksonian Democracy in New Hampshire, 1800–1851 27, n.17 (1970), so he was ineligible to hold the seat. Accordingly, by process of elimination, the General Court would've been left, once again, with choosing among two Federalists to replace a Democratic–Republican senator. Because of the Hobson's choices the Democratic–Republican General Court had in filling the vacancies, the public rationale provided an easy way out.

[176] Louis Clinton Hatch, 1 Maine: A History 200 (1919).

[177] *Id.* at 199–200.

more settled[178]—and the Senate tied 8–8 on going to a convention with the House.[179]

The impasse was extra-constitutionally broken by several National Republican machinations, all of which were invalidated by the Supreme Judicial Court. Earlier in the session, the tied Senate made electing a President of the State Senate difficult. It took fifty ballots for a choice to be made, and National Republicans resolved the tie by voting for Joshua Hall, a Democratic State Senator.[180] The unresolved gubernatorial election meant that Hall would serve as acting Governor until the matter was settled.[181] Accordingly, when the Senate next voted on going into a convention with the House, the National Republican leader in the Senate announced that Hall couldn't vote and that the motion to go into a convention was carried. A *de facto* convention was subsequently held over the protests of the Democratic senators, and four National Republican senators were elected to fill the vacancies.[182] Hall requested an advisory opinion from the Supreme Judicial Court on the legality of the selections, and the court concluded in two separate opinions

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[178] The majority requirement also applied to State House elections, and as a result, some districts required multiple rounds of elections to make a choice. Lee Webb, Party Development and Political Conflict in Maine, 1820–1860: From Statehood to the Civil War 39–40 (May 2017) (unpublished Ph.D. dissertation, University of Maine), https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=3732&context=etd [https://perma.cc/TN9G-64H7]. In some *particularly* challenging years, elections could be repeated thirteen or fourteen times with no majority winner. Yeargain, *supra* note 22, at 586. It is a reasonable inference that the Senate Democrats, potentially optimistic about their ability to win just a handful of House seats at subsequent elections, wanted to hold off filling the Senate vacancies—which would decide control of the body—until the results were more settled. Moreover, the 1829 gubernatorial election was contested, with the National Republicans in control of a joint legislative committee concluding that their candidate had won a majority by 39 votes. A minority report by the Democrats concluded that no candidate had won a majority. HATCH, *supra* note 176, at 201. Accordingly, if Democrats were able to hold off long enough to win functional control of the House, and with it the Senate, they could also throw the gubernatorial election to the legislature and elect their nominee.

[179] HATCH, *supra* note 176, at 201.

[180] *Id.* at 200–01.

[181] *Id.* at 202; *see also In re* Opinion of the Justices, 6 Me. 506, 512 (1830) ("[I]n case of vacancy in the office of Governor, the President of the Senate from the preceding political year, whose term of service as Senator expires with the year, must from necessity act as Governor . . . but the necessity ceases upon the election of a President of the new Senate, an officer then being in the full exercise of the office upon which according to the provision of the constitution, the duties of Governor devolve in case of vacancy.").

[182] HATCH, *supra* note 176, at 201–02.

that the vacancies were unconstitutional.[183] The National Republicans selected to fill the vacancies backed down, and the legislative session ended "with both parties in a bad humor."[184]

The third notable instance in which vacancies were proposed to not be filled took place in Maine in 1854. The 1853 election hadn't been settled, and the legislature was left to fill 15 Senate vacancies and to elect the governor. A makeshift coalition had started to form among Whigs, Free Soilers, and the "Woolheads," a group of antislavery Democrats, and there were tentative negotiations about splitting up the state offices to give each faction a powerful post.[185] When the Senate convened, it had only thirteen members and a temporary Democratic majority.[186] The Senate Democratic leadership tasked the Elections Committee, which was dominated by the "Wildcats," a group of proslavery Democrats, with ascertaining where there were vacancies and who the eligible candidates were. The leadership then moved to go to convention with the House to *only* fill the vacancies in the 5th and 6th Districts, where Wildcats were eligible candidates, and not in the 2nd, 3rd, 4th, 11th, or 13th Districts. The Senate voted in favor of the proposal, but the House refused.[187] The Senate repeatedly voted to convene only for the purpose of filling those vacancies, and the House repeatedly refused to do so.[188] Ultimately, the question was put to the Supreme Judicial Court, which concluded that the legislature couldn't opt to just fill *some* of the vacancies.[189] The Senate ultimately complied with the court's

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[183] *In re* Opinion of the Judges, 7 Me. 483, 491 (1830) ("The result is plain that the four persons were unduly elected by the convention, and by that election acquired none of the rights of senators."); *In re* Opinion of Justices, 6 Me. 514, 515 (1830) ("[B]eing a constitutional Senate, it is their duty 'to determine who are elected by a majority of votes to be Senators in each district,' *before* a convention of the two Houses can be formed for supplying vacancies.") (emphasis added) (citation omitted).

[184] HATCH, *supra* note 176, at 203.

[185] RICHARD R. WESCOTT, NEW MEN, NEW ISSUES: THE FORMATION OF THE REPUBLICAN PARTY IN MAINE 78, 109–10 (1986).

[186] *Id.* at 110.

[187] *Id.* at 110–11.

[188] S. J., 33rd Leg., 1st Reg. Sess. 14–23 (Me. 1854).

[189] *In re* Opinion of the Justices, 35 Me. 563, 586–90 (1854) ("The election is to be made "from *twice* the number deficient in *every* district," and "the number of Senators required" is to be elected. Twice "the number of Senators deficient in every district" is not twice the number deficient in part of the districts, nor is "the number of Senators required" a part or parts of such number. If *all* vacancies are not ascertained—if "twice the number of Senators deficient in *every* district" be not determined—it will be impossible to do what this section requires—that is, supply "the deficiency in *every* district," for it will not have been ascertained—nor to elect "the number of Senators

opinion, which resulted in the vast majority of the vacancies being filled by coalition members.[190]

### 2. How Vacancies Were Determined

Independent of the decision to fill a vacancy that unequivocally existed, there were significant controversies involving the existence, vel non, of vacancies in the first place. Though the rules were relatively simple—if no one has a majority, the legislature decides—machinations made it possible to engineer majorities where they didn't otherwise exist or to take them away where they did. These machinations almost always involved subjective determinations as to the legality of individual votes cast.

It bears noting that these machinations weren't exclusive to these three New England states. Throughout the nineteenth century, there were many challenges to how ballots were counted. This Article does not attempt to voluminously detail each counting controversy, and instead focuses on the most significant ones in these three states as they pertained to state senate vacancies. Nonetheless, questions involving the legality of votes usually fell into two buckets: questions as to how votes were recorded, and questions as to how votes were transmitted. In New England, prior to the introduction of the Australian, or secret, ballot, votes were cast orally and recorded at town meetings. The most common error that occurred when votes were orally cast was not the *number* of votes, but the *names* of the candidates for whom votes were recorded.[191] A town recorder could, simply as a mistake, misspell a candidate's name—or, even more innocuously, *abbreviate* the candidate's name. The absence of a written, government-printed ballot also caused problems for some voters who, confused as to the eligible candidates, cast their ballots for candidates

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required," for in such event "the number of Senators deficient" will not have been determined. It is only "*in case the full* number of Senators to be elected from *each* district shall not have been *so* elected" and "twice the number of Senators deficient in *every* district" shall have been determined "from the highest numbers of the persons voted for, on said lists," that the constitution commands that there *shall* be an election and that the duty to obey arises as a constitutional obligation.") (emphasis in original).

190 WESCOTT, *supra* note 185, at 111.

191 One of the first widely publicized instances in which town moderators spelled candidates' names incorrectly, which seemingly resulted in invalid votes, occurred in the 1806 Massachusetts gubernatorial election. While the Massachusetts General Court ultimately declined to invalidate enough votes to throw the gubernatorial election to the legislature, FOLEY, *supra* note 139, at 62–67, the problem of miscounted votes remained.

running in other districts.[192]

The other significant problem that arose dealt not with the recipients of the votes, but how the physical votes were handled. The decentralization of elections, and their administration at the municipal level, required states to have strict requirements for how votes should be recorded, certified, and transported. An error at any stage—like by not having a proper seal on the ballots (or no seal at all) or by being delivered late—*could* result in the wholesale invalidation of all of the ballots from a particular municipality, through no fault of the individual voters.[193]

Both sets of questions arose, quite organically, in virtually every election. Senate Journals from Maine and New Hampshire are replete with examples of issues involving the disqualification of votes because of errors in the recipient candidate's name or how the physical votes were handled, and senate elections committees made recommendations on whether the votes ought to be counted.[194] These determinations undoubtedly affected election outcomes, and it is sometimes difficult to trace those results to any malicious intent on the part of any member of any senate elections committee.[195] Moreover, even when there's evidence of

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[192] These errors are difficult to trace, but the available evidence suggests that, at most, they represented a handful of votes each year.

[193] The posterchild for this problem was the 1792 New York gubernatorial election, in which the biggest controversy—and the one that would ultimately decide the election—concerned whether Otsego County's ballots should be invalidated because of how they were handled. *See* FOLEY, *supra* note 139, at 49–61.

[194] *E.g.*, S. J., 18th Leg., 1st Reg. Sess. 19–20 (Me. 1838) ("The return from Limington was not attested on the inside by the Town Clerk, but was on the outside—these votes were allowed. In the return from Bath 493 votes were returned for 'Johnson Jacquish'—these votes were counted for Johnson Jaques; it being the unanimous opinion of the Committee that they were intended for him. The returns from Augusta, Vassalborough, Sidney, and Chesterville were not noted on the outside when they were received at the Secretary of State[']s Office: These votes were all allowed and counted by your Committee. The returns from Dedham, Beddington, Wesley and No. 23, Hancock County, were not attested by the Selectmen or Clerks on the outside, but were perfect on the inside; also the return from No. 1, in the same County was perfect—on the inside and attested only by the Clerk on the outside—these votes were all counted."); S. J., 35th Leg., 1st Reg. Sess. 10 (Me. 1856) ("Upon evidence exhibited in the papers before the Committee 378 votes returned for Alexander Judkins are allowed and counted for Alexander Junkins. The return from the town of Elliot did not state the number of votes given for any candidate for Senators. Information was before the Committee under the official signature of the town officers, that two hundred and six votes were cast in that town for two of the candidates who are elected, and two hundred and four votes for the third candidate, but the Committee did not deem it suitable to count these votes in their favor.").

[195] For example, in 1856, the Senate Elections Committee opted to count votes cast for "Alexander *Judkins*" as properly cast for "Alexander *Junkins*." The threshold for receiving a majority

malicious intent, it can be difficult to separate that intent from the propriety of the decision.[196]

Nonetheless, even according great deference to the legislature's ultimate determination in the ordinary case, there are several seriously egregious instances in which the legislative majority—or other vote-counters—clearly bent the rules and invalidated ballots as part of a manipulative ploy to achieve its desired result.

The most serious controversy took place in New Hampshire in 1875. That year, it appeared as though there were two failures to elect in Districts 2 and 4, where two Democrats—James Priest and John Proctor—won pluralities but not majorities.[197] With those two seats left unfilled, Democrats and Republicans would've tied the Senate 5–5, and the elections would've been thrown to the General Court. Because Republicans held a 9-vote majority in the House,[198] it was likely that two Republicans would've been elected.

However, outgoing Democratic Governor James Weston and a Democratic majority on the Executive Council, exercising their power under the state constitution to examine election results and issue summonses to the winners,[199] declared that Priest and Proctor had won majorities.[200] They opined that votes cast for "Natt Head," the Republican candidate in District 2, should be rejected because they did not contain Head's "full Christian name."[201] In District 4, where Republican George E. Todd trailed Proctor by just 38 votes, they rejected 2 votes cast for "G. E. Todd" as not including the candidate's Christian name, and 46 votes for Arthur Deering, 1 vote for James M. Bishop, 9 votes for Abraham Thorpe, and 3 votes for Benjamin M. Gilmore because the candidates didn't live in the district.[202] With

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of the vote in District 1, where Junkins ran, was 5,715 votes. With those votes included, Junkins received 5,729 votes—just 14 votes more than he needed. Accordingly, the Committee's decision assured Junkins's election, but there's no indication that its decision to do so was manipulative. *See* S. J., 35th Leg., 1st Reg. Sess. 10 (Me. 1856).

196 FOLEY, *supra* note 139, at 54–55 (concluding that the errors in Otsego County in the 1792 New York gubernatorial election may have resulted in its ballots being "irredeemably tainted and uncountable—although that entailed the disenfranchisement of the entire county in the gubernatorial election").

197 *In re* Opinion of the Justices, 56 N.H. 570, 570–71(1875) (collecting election results).

198 DUBIN, *supra* note 25, at 122.

199 N.H. CONST. pt. II, § 33 (1792).

200 *Opinion of the Justices*, 56 N.H. at 573.

201 *Id.* at 570.

202 *Id.* at 571.

those omissions, Proctor won a slim majority.[203]

After the Governor issued summonses to Priest and Proctor and swore them into the Senate, the Republican minority objected to them being seated. But the Senate, exercising its power to judge elections, voted down the objections.[204] The Republican majority in the State House lodged a protest, and the Republican Senate minority sought the ruling of the New Hampshire Supreme Court, which declined to intervene. It concluded that the constitutional power given to the Governor, Executive Council, and Senate was absolute—"there can be no appeal" from the Senate's decision because, "[b]y the express terms of the constitution, the action of the Senate is made *final*."[205]

Few other events can live up to the high drama of New Hampshire in 1875, but several others are worth noting. In Massachusetts in 1837, the Senate Elections Committee noted that three towns in the Berkshire district—Richmond, Sheffield, and Williamstown—had failed to comply with procedural requirements. All three towns' returns were not "directed to the Secretary of the Commonwealth," as the law required, and the Richmond return was not sealed. If the results were included, there were no vacancies—but if they were excluded, there was a single vacancy.[206] Following a contentious debate in the Senate, an amendment to the report, which included returns from all three towns, was narrowly approved and the report as a whole was then adopted.[207]

In New Hampshire, in the years following Weston's coup, Republicans turned the table and used their power to their advantage. In 1878, it appeared as though Republican Emmons B. Philbrick won a 50–48% majority in District 1 over Democrat Marcellus Eldredge. [208] Eldredge, however, sought to challenge the result, apparently arguing that Philbrick was ineligible to hold office because he did not live in the district. [209] The Republican majority initially gave Eldredge the

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[203] *See* SUMMERS, *supra* note 139, at 115–16.

[204] Opinion of the Justices, 56 N.H. at 573.

[205] *Id.* at 573 (emphasis in original).

[206] S. REP. 4, at 10–11 (Mass. 1837)

[207] *Berkshire Senators*, PITTSFIELD SUN, Jan. 19, 1837, at 1.

[208] S. J., Gen. Sess. 11 (N.H. 1878) [hereinafter 1878 Senate Journal].

[209] *Doings at Concord*, NASHUA DAILY TEL., June 7, 1878, at 1 ("The Democratic candidate is the brewer Eldredge of Portsmouth, who is here claiming a seat on the ground that the votes cast for one of his opponents were nullities, as he was ineligible. It is the Arthur Deering case over again, and goes to show that the Democrats would repeat the Senate steal if they had the power.") [hereinafter *Doings at Concord*].

opportunity to present his case,[210] but then declared a vacancy and threw the election to the General Court, which elected Philbrick,[211] closing the case.

In 1887, it appeared as though no candidate won a majority in District 12; Democrat John F. Hall won 49.9% of the vote, and Republican Charles H. Looney won 48.3%.[212] Hall, however, requested a recount, arguing that the results showed that he would have won a majority if the votes were properly tabulated.[213] In the meantime, however, the Senate declared that there was a vacancy and the General Court filled it with Looney.[214] About a month later, the Senate Elections Committee issued a majority report concluding that Hall "neglected to present any evidence that the votes were not correctly counted and returned, and no evidence of any nature . . . to question the accuracy of the foregoing record of the vote cast," recommending no recount.[215] The Republican Senate majority adopted the report over the objections of the Democrats on the committee, who issued a minority report recommending a recount.[216]

Similarly, in 1889, the Republican majority denied two recount requests. In District 9, Democrat George Brown won a narrow plurality over Republican John Pearson, 49.8–47.8%.[217] And District 12, Democrat John Hall won 49.95% to Republican Edward Willson's 48.9%, with "John A. Fall" winning 1.15%.[218] Both requested recounts, which apparently showed that they had actually won

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[210] S. J., Gen. Sess. 14 (N.H. 1878) (adopting resolution that allowed Eldredge to have until Tuesday, June 11, 1878, "to present a formal protest or memorial to this body in support of his claim, and that any action of the Senate taken to-day shall not prejudice any rights of Marcellus Eldredge to his seat that may now exist"); *see also Doings at Concord*, *supra* note 209 at 1 ("The Senate will give Eldredge a hearing at 9 o'clock this morning, though every Republican knows he has no case, and every honest Democrat admits it.").

[211] 1878 Senate Journal, *supra* note 208 at 14–15 ("*Resolved*, That a message be sent to the House of Representatives, by the clerk, that from an examination of the returns of votes there appears to be a vacancy in senatorial district No. 1; that Emmons B. Philbrick and Marcellus Eldredge are the two highest candidates, and that the Senate are ready to meet the House in convention, at such time as the House may suggest, for the purpose of filling the vacancy in the Senate agreeably to the provisions of the constitution."); H. J., Gen. Sess. 246 (N.H. 1878) (electing Philbrick).

[212] S. J., Gen. Sess. 10 (N.H. 1887) [hereinafter 1887 Senate Journal].

[213] *Id.* at 7; *see also id.* at 290 (quoting the petition).

[214] *Id.* at 160.

[215] *Id.*

[216] *Id.* at 160–62.

[217] S. J., Gen. Sess. 9–10 (N.H. 1889) [hereinafter 1889 Senate Journal].

[218] *Id.* at 10. It's certainly possible that those voting for "John A. Fall" intended to vote for "John F. Hall," but it does not appear that argument was made.

majorities,[219] and Senate Democrats twice moved, unsuccessfully, to seat Brown and Hall.[220] When the General Court convened to fill the vacancy, House Democrats objected once again, arguing that the recounts showed Brown and Hall as the winners. [221] However, the Speaker of the House shut down the Democrats' argument, noting that the Senate had judged that a vacancy occurred and that the House could not override that determination.[222]

3. Coalition Agreements and Filling Vacancies

Though the United States has largely remained a two-party democracy, during certain periods of American history more than two parties were major players in state politics, largely because of their ability to form governing coalitions. This was especially true in Maine, Massachusetts, and New Hampshire. The existence of state senate vacancies, and the ability to fill them by indirect election, played a major, if understated, role in the formation of governing coalitions.

In the 1840s and 1850s, the Second Party System—dominated by the Democrats and Whigs[223]—significantly weakened, eventually resulting in the demise of the Whig Party by the late 1850s. During this time period, though the Democrats and Whigs remained the dominant parties, third parties, like the Liberty Party[224] and the Free Soil Party[225] rose to prominence in New England. As they did so, they

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219 *See Concord Connings*, NASHUA DAILY TEL., June 6, 1889, at 2 ("[State Representative Page] declare[d] that a recount had been made in District No. 9 and 12, which showed the election of Messrs. Hall and Brown, Democrats."); H. J., Gen. Sess. 365–66 (N.H. 1889) (noting that "Mr. Page of Haverhill protested . . . against proceeding to a ballot to fill [the] said vacanc[ies]") [hereinafter 1889 House Journal].

220 S. J., Gen. Sess. 4 (N.H. 1889) (". . . Senator Mitchell offered the following resolution: *Resolved*, That the names of George L. Brown, senator from District No. 9, and John G. Hall, senator from District No. 12, be placed upon the roll, and that they be admitted to seats in the Senate. The resolution was not adopted."); *id.* at 13–14 ("Senator Conn offered the following amendment: Strike out the whole of that portion of the resolution relating to George L. Brown, John C. Pearson, John F. Hall, and Edward T. Willson, and insert the following: That John F. Hall and George L. Brown are legally elected senators in Districts Nos. 9 and 12 respectively. . . . The amendment was rejected.").

221 *Concord Connings*, *supra* note 219, at 2.

222 *Id*.

223 BASS, *supra* note 160, at 8–10.

224 The Liberty Party organized out of abolitionist organizations in the 1840s and was singularly decided to abolishing slavery. It was functionally abolished by the late 1840s, when it merged with the Free Soil Party. Berg, *supra* note 132, at 344–47.

225 The Free Soil Party organized out of the Liberty Party in the late 1840s and advocated for a more moderate position on slavery—specifically, one that sought not to abolish slavery, but rather

frequently deprived the major parties of majorities in gubernatorial and state legislative elections, which in Maine, Massachusetts, and New Hampshire, threw the elections to the legislature to resolve. Even though the Liberty and Free Soil parties never held more than a handful of seats at a time in any state legislature, they were nonetheless able to form both temporary and more durable governing coalitions with the major parties, extracting power and concessions in the process.[226]

Though third parties rose to prominence all over New England and not just in these three states,[227] the majority requirement and the method of filling senate vacancies positioned third parties particularly well to join governing coalitions. If a third party managed to elect even a few state representatives in an evenly or closely divided house in one of these three states, it would be able to have an outsized influence in determining the composition of the state senate. The third parties could trade their vacancy-filling votes for something else—the Speakership, a seat on the state's executive council, a legislatively elected statewide position like treasurer or secretary of state, or even a senatorship or governorship.

At least two times in the 1840s, the Liberty Party was positioned to be kingmaker. In New Hampshire, the 1846 elections produced a Democratic plurality in the State House, but a coalition of Independent Democrats, Whigs, and Liberty Party members joined forces to form a majority.[228] The partners of the coalition majority traded favors to each other: they elected Independent Democrat John P. Hale as Speaker of the House, and then to the U.S. Senate in 1847; Liberty candidate Joseph Cilley to fill a U.S. Senate vacancy in 1846; and Whig Anthony Colby as Governor. [229] They also filled seven state senate vacancies with Whig Party candidates.[230]

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to contain it in the states and territories in which it was already legal. Frederick Blue, *Free Soil Party: 1848–1850s*, *in* 2 The Encyclopedia of Third Parties in America 263, 263–67 (Immanuel Ness & James Ciment eds., 2000).

226 *See supra* notes 130-134 and accompanying text.

227 *E.g.*, Adam Chamberlain, *Voter Coordination and the Rise of the Republican Party: Evidence from New England*, 38 Soc. Sci. Hist. 311, 314 (2014).

228 Thomas G. Mitchell, Antislavery Politics in Antebellum and Civil War America 29 (2007).

229 *Id.*; Michelle Anne Fistek, *New Hampshire: Is the Granite Grip of the Republican Party Cracking?*, *in* Parties & Politics in the New England States 37, 39 (Jerome M. Mileur ed., 1997).

230 *New-Hampshire: All Hale!*, N.Y. Trib., June 5, 1846, at 2 [hereinafter *All Hale*]. The General Court also filled two Executive Council vacancies with two Whigs, *N. Hampshire—John P. Hale Elected Senator by Both Houses—Whig Councillors, &c.*, N.Y. Trib., June 12, 1846, at 1 [hereinafter *Whig Councillors*], elected Whigs as Public Printer and Commissary General, and independent

But the Liberty Party had not been so lucky in effectively using its power in Maine or Massachusetts. In Maine, Liberty Party leaders were wary of forming governing coalitions out of fear that doing so would compromise the ideals of their party.[231] And in Massachusetts, the Party's theoretical kingmaker status in 1844 didn't pan out as planned. There, the 1843 elections resulted in a great deal of uncertainty: the gubernatorial election hadn't produced a majority winner (so the General Court would make a selection) and the Senate had fourteen Democrats, ten Whigs, and 16 vacancies, which would be filled by the General Court. The Liberty Party had elected a handful of state representatives and hoped to either elect a Liberty Speaker of the House or Governor. They planned on filling the Senate vacancies with six Democrats and ten Whigs so that the Senate would be tied—thereby making Liberty Party gubernatorial nominee Samuel Sewell a possible compromise candidate. But the planned coalition fell through and sixteen Democrats were elected to fill the Senate vacancies, enabling the General Court to select the Democratic nominee as governor. Their plans of electing a Liberty Speaker of the House similarly fell through when Daniel P. King, an abolitionist Whig, was elected Speaker, albeit with Liberty support.[232]

When the Free Soil Party was formed out of the remnants of the Liberty Party in the late 1840s, it performed significantly better in Maine and Massachusetts, and was able to wield its power much more effectively. A schism in the Maine Democratic Party over slavery and prohibition enabled the more aggressively anti-slavery faction of the Party to align with the Whigs and Free Soils—that coalition elected a bipartisan group of Democrats and Whigs to fill the state's Senate vacancies and then elect William Crosby, the Whig nominee, as governor in 1853.[233] The same coalition developed in 1854 and similarly elected a bipartisan group of likeminded candidates to fill the Senate vacancies.[234] But here, the coalition faltered. The renegade Democrats joined the coalition with the expectation that it would elect Anson Morrill, a Democrat, to the governorship, but the Whig Senators broke their promise and cast the deciding votes for Crosby's re-election over

Democrats as Secretary of State and Treasurer. *New Hampshire*, Vicksburg Daily Whig, June 30, 1846, at 3.

231 *See* Reinhard O. Johnson, *The Liberty Party in Maine, 1840–1848: The Politics of Antislavery Reform*, 19 Me. Hist. Soc'y Q. 135, 146–47 (1980).

232 Reinhard O. Johnson, The Liberty Party, 1840–1848: Antislavery Third-Party Politics in the United States 29–30 (2008).

233 Wescott, *supra* note 185, at 104–06.

234 *Id.* at 110–11.

Morrill. [235] The coalition organized again in 1855—during the course of its organization, it would eventually become the Republican Party—and this time, elected Morrill as Governor and split state offices among its constituent members.[236]

A similar coalition developed in Massachusetts. In 1851 and 1852, the Democratic and Free Soil parties joined together to form a governing coalition in both chambers of the General Court. As part of the agreement, the coalition agreed to elect a Free Soiler to the U.S. Senate and as State Senate President and to otherwise largely elect Democrats to positions in state government, including Governor George Boutwell.[237] The coalition filled 8 Senate vacancies with 5 coalition members (3 Democrats and 2 Free Soilers) and 3 Whigs.[238] Later that year, despite a schism emerging in the coalition, it secured another term for its leaders at the annual election. [239] When the General Court convened in 1852, there were 12 vacancies to fill. It filled them with 11 coalition backers (5 Democrats, 4 Free Soilers, and 2 of ambiguous affiliation) and 1 Whig [240]—the Whig was chosen over a Democratic candidate because of ideological differences concerning the state's liquor law.[241] The coalition lost re-election in 1852, but a reformed version of it was swept into power several years later as the newly formed Republican Party.[242]

After the 1850s, several additional coalitions of note developed in New Hampshire, [243] but these coalitions were largely borne out of state-specific

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235 *Id.* at 111.

236 *Id.* at 129–30.

237 Fred Harvey Harrington, *Nathaniel Prentiss Banks: A Study in Anti-Slavery Politics*, 9 NEW ENG. Q. 626, 631–32, 631 n.25, 632 n.27 (1936); Thomas H. O'Connor, *Irish Votes and Yankee Cotton: The Constitution of 1853*, 95 PROCEEDINGS OF THE MASS. HIST. SOC'Y 88, 88–89 (1983); Samuel Shapiro, *The Conservative Dilemma: The Massachusetts Constitutional Convention of 1853*, 33 NEW ENG. Q. 207, 209 n.8, 210 (1960).

238 *The Coalition*, FALL RIVER MONITOR, Jan. 11, 1851, at 2. Somewhat surprisingly, though much has been written about the Democratic–Free Soil coalition in Massachusetts, little attention, if any at all, focused on how the senate vacancies were filled. *See generally, e.g.*, BLUE, *supra* note 133, at 207–31; Ernest A. McKay, *Henry Wilson and the Coalition of 1851*, 36 NEW ENG. Q. 338 (1963) (discussing the coalition); Shapiro, *supra* note 237, at 208–10.

239 BLUE, *supra* note 133, at 219–28.

240 *The Legislature of this State*, PITTSFIELD SUN, Jan. 15, 1852, at 2.

241 LIBERATOR, *supra* note 164, at 3.

242 *See* BLUE, *supra* note 133, at 275–80, 284.

243 Massachusetts amended its constitution in 1860 in two significant ways: it abolished the majority requirement and required special elections to fill senate vacancies. FRIEDMAN & THODY, *supra* note 31, at 120–21. Maine similarly abolished its majority requirement for the state senate in

circumstances. In 1871, Democrats formed a narrow, one-vote majority in the State House by forming a coalition with the Labor Reform Party,[244] a short-lived political party that "formed largely as a result of factionalism within both parties."[245] The coalition partners each got something out of the exchange: William Gove, a Labor Reformer and former Republican, was elected as Speaker in exchange for electing James Preston, a Democrat, as Governor.[246] As alleged by the *Nashua Daily Telegraph*, a newspaper supportive of Republicans, the coalition won its majority by virtue of the fact that two Republican State Representatives were ill and unable to attend the legislative session, and because the coalition kept in office several of its members who were constitutionally ineligible to hold office.[247]

After narrowly electing a Labor Reformer–Democratic Speaker and a Democratic Governor, the legislature set out to fill two vacancies: one caused by a failure to elect in District 1, and another caused by an untimely death in District 10. In District 1, the narrow Democratic–Labor Reformer majority in the House, coupled with a tie in the Senate,[248] meant that Democrat Daniel Marcy, the plurality

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1875. TINKLE, *supra* note 17 at 71. Accordingly, while a Democratic–Greenback coalition gained power in the Maine House of Representatives in 1879, the coalition was unable to gain post-election control over the senate. *See* Whitmore Barron Garland, Pine Tree Politics: Maine Political Party Battles, 1820–1972 50–52 (Feb. 1979) (unpublished Ph.D. dissertation, University of Massachusetts) (on file with author), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=2908&context=dissertations_1 [https://perma.cc/J7A5-84G2]

244 *New Hampshire: Singular Democratic Victory in a Republican State*, N.Y. TIMES, June 8, 1871, at 1, https://www.nytimes.com/1871/06/08/archives/newhampshire-singular-democratic-victory-in-a-republican-state-the.html [https://perma.cc/K5XZ-UE23] [hereinafter *Singular Democratic Victory*].

245 Renda, *supra* note 137, at 173; *see also* Adelman, *supra* note 137, at 321–22.

246 *See Singular Democratic Victory*, *supra* note 244, at 1.

247 *E.g.*, *"Drift"ings*, June 12, *supra* note 153, at 1–2; *"Drift"ings from Concord*, NASHUA DAILY TEL., June 8, 1871, at 1 ("At least three Democratic Representatives had no shadow of right to seats in the House. These are Page of Concord, Messer of Northwood, and Parsons of Bennington. Page was not elected and his certificate shows it; the other two have not resided in the State the two years required by the constitution, and the affidavit of each is available to that effect in the case."); *"Drift"ings from Concord*, NASHUA DAILY TEL., June 6, 1871, at 1 ("[T]wo Republican representatives are sick, one past hope of being present at the opening of the session. The sick men are Johnson of Pittsburg and Scott of Keene. There is some hope that the latter may reach Concord to-morrow. Luckily he is in the hands of a Republican medicine man, and will be brought out all right if skill and patriotism can do it. Possibly the Pittsburg man is in the hands of some Democratic Esculapius, in which case there is little hope for him, until after the organization.").

248 *The Democracy Overwhelmed with Victory*, NASHUA DAILY TEL., Mar. 15, 1871, at 1 ("The Senate may be tied, but the chances are that some Democratic Senator will turn up to untie it.").

winner, was narrowly elected, 164–162, over the Republican, William R. Martin.[249]

The vacancy in District 10 proved somewhat more challenging. The vacancy was caused by the death of a Democrat, meaning that the two constitutional candidates were Republican Albina Hall and Alvah Smith, an independent candidate and former Republican who received 4 votes.[250] House Democrats had attempted to postpone the filling of the vacancy, perhaps not wanting to choose between two Republicans, but Republican opposition prompted them to withdraw that effort. Instead, they pushed every Democrat and Labor Reform legislator to vote for Smith.[251] The coalition majority then apparently reviewed "every vote as given" to ensure that all Democrats and Labor Reformers actually voted for Smith.[252] Smith then beat out Hall, 167–161.[253] This meant that, Smith's erstwhile status as a Republican notwithstanding, Democrats managed to eke out a 7–5 governing majority in the Senate.[254]

And in 1913, the last year that the General Court was able to fill vacancies, Republicans won a slim majority in the State House, but defections from Progressive (or Bull Moose) Republicans allowed Democrats to strike a similar deal as in 1871.[255] Progressive Republican William J. Britton was elected as Speaker, Democrat Samuel Felker was elected Governor, Democrat Henry F. Hollis was

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249 H. J., Gen. Sess. 68 (N.H. 1871).

250 *New England News Summary*, NASHUA DAILY TEL., Apr. 13, 1871, at 2; see also N.H. CONST. CONVENTION J. 140–41 (1889) [hereinafter 1889 CONSTITUTIONAL CONVENTION JOURNAL].

251 *See "Drift"ings*, June 12, *supra* note 247, at 2.

252 *Id*.

253 H. J., Gen. Sess. 69 (N.H. 1871). At the 1889 Constitutional Convention, Delegate William C. Todd noted that, given the choice between handing a Senate seat to the opposition or electing a "joke" candidate who received just a handful of votes, the General Court would usually opt for the latter. He specifically called out Smith's selection in particularly colorful terms, noting, "I do not think the result showed that a single man who voted for that Alvah Smith but felt ashamed of his action, . . . He represented nobody, and nobody was proud of him." 1889 CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 250, at 140–41.

254 *"Drift"ings from Concord*, NASHUA DAILY TEL., June 9, 1871, at 1 (identifying Alvah Smith as a Republican who would "go with" the Democrats, and that "[i]f the Democrats succeed in filling the two Senate vacancies [with Marcy and Smith], they will secure a reliable, working majority"). A summary of legislatures' partisan affiliations lists the New Hampshire Senate's final composition as tied, 6–6. DUBIN, *supra* note 25, at 122. It is likely that Smith, for all practical purposes a Republican, was counted as a Republican in that regard, but it's clear that he effectively caucused with Democrats. George Pitman, a Democrat, was elected President of the New Hampshire Senate, which operates as persuasive proof that Democrats had a working majority.

255 WRIGHT, *supra* note 143, at 143–44.

elected to the Senate, and four Democrats were elected to fill state senate vacancies, giving Democrats a 14–10 majority in that chamber.[256]

## III. EVALUATING THE NEW ENGLAND SENATES

Having laid out the theory for why indirectly elected legislative chambers were adopted and how the New Hampshire Senate was constituted during its period of *de facto* indirect election, this Part brings the two together. In Section A, it evaluates the values that indirect election allegedly provided, and determines how, and to what extent, those values were served by state senates in Maine, Massachusetts, and New Hampshire. It ultimately concludes that, even assuming the asserted values were legitimate, they were undermined, not advanced, by these legislatures. Section B then considers why these questions are relevant today, by comparing it with how other states currently fill legislative vacancies.

### *A. The Values of Indirect Election at Play in New England*

As explained previously, four main values were advanced in support of indirectly elected legislative chambers, both in state senates and in the U.S. Senate: (1) serving as a check on the democratically elected House of Representatives; (2) creating a well-qualified body; (3) advancing the state's long-term interests; (4) avoiding the exclusive advancement of parochial interests; and (5) avoiding corruption.[257] Assuming those values are legitimate and worthy of advancement, the New Hampshire model utterly failed to act in accordance with them.

#### 1. Checking the House

Creating a check on state houses of representatives is arguably the most legitimate reason for indirectly elected senates. As several scholars have noted, for a check wielded by one actor to work as to another, the two actors' powers must come from different sources.[258] Accordingly, if the power of a house of representatives comes from the people, it is adequately checked by the power of the Senate, which comes from the elite. Standardizing the system of election for both chambers effectively nullifies the reason for having *two* chambers in the first place—each chamber's power comes from the same place, thereby creating random, not

[256] *Id.*; *see also* Fistek, *supra* note 229, at 39.

[257] *See supra* Part I.B.

[258] *See supra* notes 72-76 and accompanying discussion.

purposeful, checks.[259]

State senates in Maine, Massachusetts, and New Hampshire, at least in the abstract, seem to facially serve this value. Though the Senates were obviously not *entirely* indirectly elected—they were instead both elected by the voters, with legislative election as a (frequent) backup—the principles nonetheless apply. The state houses, at all relevant times, were exclusively directly elected, and the senates were partially indirectly elected. It makes sense, therefore, to surmise that the power of the two chambers comes from different places. The houses' power came from the people; the senates' power came from the elected legislature. In that way, the state houses effectively operated in a manner similar to the Kentucky or Maryland electoral colleges—all were directly elected by the people and, in turn, elected the members of the state senates.

But this idea did not hold up very well in practice. Because the houses played a much larger role in electing the state senates than any other actor did, the state senates were effectively subservient to the state houses. Indeed, in thinking about the state senates' machinations to deliberately kick its vacancies to the entire legislatures, it is hard to conclude that the senates could ever get the upper hand. Only when the Senate majority conspired to effectively cut the House out of the process by judging its own elections was any Senate able to hold its own. But even then, its ability to do so was conditioned on its willingness to apply inconsistent rules—about when votes should be counted, and under what circumstances—and could be easily undone at the next election.

We might also conceptualize the checks and balances at play not as between the different chambers of the legislature, but between the party with a majority in the state house and the party that was able to hold a plurality in the state senate before vacancies were filled. If those parties were the same, then they operated as a united front, filled the vacancies, and installed a favorable Senate majority. But if they weren't, each party operated with its own set of incentives. As was the case countless times during the indirect election process, whichever party made up a plurality in the Senate had every reason to *not* find that there were vacancies and to employ creative vote-counting strategies to do so, and the party in the Senate minority had every reason to find that there *were* vacancies so that its more numerous counterparts in the house could fill them.[260]

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[259] Of course, in the twenty-first century, where one-person-one-vote governs the composition of state legislative chambers and all state legislatures are directly elected, this argument is more supportive of turning to unicameralism than it is of returning to indirect election, as some anti-Seventeenth Amendment advocates suggest we should.

[260] *See supra* notes 197-205 and accompanying text.

However, these checks are conceptualized, the divide likely wasn't between the democratically elected chambers and the indirectly elected. The senates never claimed a worthier, more legitimate mandate because of its indirect election. If anything, the willingness of party coalitions in the houses to form majorities, and then to install like-minded senate majorities, shows that, at times, the house could play the role of the undemocratic chamber.

2. Creating a Well-Qualified Body

The framers of the U.S. Constitution, along with the framers of the Kentucky and Maryland Constitutions, expressed similarly aspirational thoughts about how providing for indirect election would result in the development of a uniquely well-qualified body.[261] To some extent, the argument in support of this assumption is too clever by half—under all of these systems, the *people* elected the people who picked the senators. If there were true concerns about the caliber of person selected by the people to serve in the House, those concerns should also be present about the caliber of person that *those* people would select.

But in any event, even setting aside the fact that Maine, Massachusetts, and New Hampshire created *de facto* indirectly elected senates, their constitutions clearly operated with this aspiration in mind. Vacancies in the state houses were filled by special elections; vacancies in the state senates were filled by the legislature. That very divergence suggests that the framers of the constitutions had concerns about how special elections might turn out—perhaps reflecting an ahead-of-their-time worry about how the low turnout and unrepresentative nature of special elections would produce inconsistent results.[262]

Prior to the adoption of the Massachusetts and New Hampshire constitutions—a period of time in which parties did not exist in the modern sense—it might have made sense to assume that the legislature would select the most qualified people to fill vacancies. It may well have been the case that individual legislators would opt to fill vacancies by deferring to a candidate's ideological stance—were they a populist or a conservative?[263]—but that sort of issue-by-issue determination reflects, at its core, *some* form of objective evaluation.

The development of modern political parties likely changed how legislators made their decisions. Partisanship is a powerful heuristic—and when party

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[261] McMahon, *supra* note 66, at 479; Letter from George Nicholas to James Madison, *supra* note 89.

[262] *See generally* Tyler Yeargain, *Maryland's Legislative Appointment Process: Keep It and Reform It*, 51 U. Balt. L.F. 1 (2020) (discussing the arguments against special elections).

[263] *See supra* notes 50-54 and accompanying text.

affiliation determines political power, suddenly, it makes sense to disregard any sense of objective evaluation and instead to blindly follow the party line. As mentioned previously, short of arriving at any sort of gentleman's agreement to pick the plurality winner, regardless of context, it makes little rational sense for a legislator to vote to fill a Senate vacancy with a member of the *opposite* party.[264] One party's gain is another's loss. Moreover, even assuming the presence of such a gentleman's agreement, it's difficult to conceptualize how a gentleman's agreement *to select the most qualified candidate* could possibly be distilled.

It appears clear that, in filling senate vacancies, the legislatures in these three states didn't set out to deliberately build out senates that were well-qualified bodies. This conclusion isn't predicated on a vacancy-by-vacancy evaluation of each candidates' qualifications—it's predicated on the fact that the most powerful predictor of which candidate filled a vacancy was that candidate's party affiliation.[265] If objective qualification were a more powerful motivator in filling vacancies, we might expect more instances in which legislative majorities picked members of the minority to fill vacancies. But that simply didn't happen. Instead, the expectation that candidates would be chosen based on their party affiliation was so widespread that, when reporting on the number of vacancies, newspapers would routinely (and correctly) predict that the vacancies would all be filled with members of the majority party.[266]

And consider again how session vacancies were filled. The decision to elevate a candidate who received just a handful of votes—sometimes as little as three or

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[264] *See supra* note 156 and accompanying text.

[265] *See supra* Part II.B.2.

[266] *Maine Election*, NORTH STAR (Danville), Sept. 18, 1848, at 2 ("The [Maine] house of representatives being democratic, will fill vacancies in the senate, and the power of the democracy will be preserved."); *Maine Election*, PITTSFIELD SUN, Sept. 28, 1854, at 2 ("When the fusion candidate shall be chosen by the [Maine] Legislature, the Senate will stand whigs 16, Morrill, &c., 15."); *New Hampshire*, PITTSFIELD SUN, Mar. 25, 1852, at 2 ("The vacancies in the [New Hampshire] Senate will *of course* be filled with Democrats.") (emphasis added); *Official Vote for Senators*, PITTSFIELD SUN, Dec. 29, 1853, at 2 (When filled, the [Massachusetts] Senate will be composed of 30 whigs, 10 coalitionists."); *The Election*, BOSTON POST, Nov. 10, 1841, at 2 ("The [Massachusetts] Senate, after all vacancies are filled, will probably be composed of 13 democrats and 27 whigs; whig majority, 13."); *The Election: New Hampshire*, NASHUA DAILY TEL., Nov. 6, 1878, at 2 ("We [Republicans] have carried fifteen Senatorial districts, the Democrats five, with no choice in four, which will be filled by the legislature and the Republican candidate selected."); *The New Hampshire Election*, BOSTON GLOBE, Mar. 14, 1873, at 5 ("These vacancies will be filled by electing Charles Sanborn, Republican, in the Second district, and Otis G. Hatch, Republican, in the Sixth district. The Senate will then stand nine to three.").

four—over a candidate who received at least a thousand votes[267] is hard to defend as a decision based on an objective evaluation of each candidate's respective qualifications.

3. Advancing the State's Interests

Like creating a well-qualified body, advancing the state's interests is an entirely subjective concept lacking in objective measurements. Even with that in mind, however, it is clear that the New England model for its state senates failed to materially advance any state interests—and indeed actively undermined them.

The argument in favor of indirect elections that relies on the achievement of this value goes something like this: The people are prone to demagoguery and are susceptible to being manipulated. Left to their own devices, without an adequate check on the expression of their will, the country's democratic institutions will fail. Indirect election serves as a balance on this tendency—the people can never go *too* far, because they'll always be checked by an indirectly elected body that is accountable to the republic, to the democracy, and to the perpetuation of its constitutional norms.

That simply didn't happen. As the Kentucky and Maryland examples showed, an indirectly elected legislative body eventually morphs from representing the people, however indirectly, to representing its own interests. In Kentucky, the electoral college picked from among its own members in constituting the Senate.[268] In Maryland, the electoral college was picked by virtue of a quasi-gerrymandered, county-based system, and even a slight majority on the electoral college allowed for total domination of the Senate.[269] And in both states, the Senate's ability to fill vacancies itself ultimately led to a body that was *indirectly* elected, and solely interested in perpetuating its own power.[270] Kentucky saw this firsthand—in the short period of time between the first and second constitutions, the Senate tightly clung to its power, refusing to embrace popular constitutional reforms out of fear that it would be displaced.[271] In both states, the damage to the states' democratic institutions was severe and the backlash from the public was severe.

So, too, in Maine, Massachusetts, and New Hampshire, was each state's basic

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267 *See supra* notes 149-155, 168-172, and accompanying text.

268 HARRISON, *supra* note 85, at 133–34.

269 Hagensick, *supra* note 43, at 347–48.

270 *See* COWARD, *supra* note 15, at 103 (noting that a majority of Kentucky's State Senate had been selected by their colleagues to fill vacancies); Hagensick, *supra* note 43, at 347–48 (noting that, during one period, all but one of Maryland's State Senators had been selected to fill vacancies).

271 COWARD, *supra* note 15, at 103.

form of government undermined. The effect of *repeatedly* having control of their senates determined by something akin to chance, having norms disregarded, and having rules inconsistently applied was damaging. The actions of the Senate plurality, the Governor, and the Executive Council in New Hampshire in 1875—which disqualified votes to avoid vacancies, ensuring Democratic control of the chamber[272]—effectively functioned as a coup. Republicans rightly perceived it as a theft. [273] The harm was compounded by the fact that Governor Weston, who orchestrated the coup, was in his final days as Governor[274] and effectively tied the hands of his Republican successor. But in the years that followed, the Republicans' response was just as harmful: denying recounts, [275] refusing to grant losing candidates hearings to review the results,[276] and declaring vacancies rather than even *attempting* to ensure that the electorate's will was represented in how it was represented[277] collectively serve as just as much of a coup.

But in these states, state senators weren't the only political actors that were selected in that manner—in all three states, the Governor was also required to win a majority of the vote to hold office, and in New Hampshire, the Executive Council was held to a similar requirement. Though this Article does not attempt to exhaustively review *all* of those elections, it's worth noting that between 1820 and 1880, 10 gubernatorial elections out of 60 in Maine were decided by the Legislature (representing 16% of all gubernatorial elections), 3 of which resulted in the second-place finisher being selected over the first-place plurality winner, and 1 of which resulted in the *third*-place finisher being elected.[278] In Massachusetts, between 1780 and 1860, 13 out of 81 gubernatorial elections were decided by the General Court (also 16% of all gubernatorial elections), 2 of which resulted in the second-place

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[272] *See supra* notes 197-205 and accompanying text.

[273] *See, e.g.*, *Doings at Concord*, *supra* note 209, at 1 ("…Democrats would repeat the Senate steal if they had the power.")

[274] *See* S. J., Gen. Sess. 26–27 (N.H. 1875) (noting that Republican Person C. Cheney was elected as Governor for the term beginning in 1875).

[275] *See supra* notes 212-216 and accompanying text (discussing Republican Senate majority's refusal to allow Democrat John Hall to receive a recount in 1887); *supra* notes 137, 139 (discussing Republican Senate majority's refusal to allow Democrats John Hall and George Brown to receive recounts in 1889).

[276] *See supra* notes 208-211 (discussing Republican Senate majority's refusal to allow Democrat Marcellus Eldredge to challenge election results).

[277] *See, e.g.*, *supra* notes 208-211.

[278] Foley, *supra* note 139, at 163–69 (detailing Alonzo Garcelon's election in 1878, Daniel Davis's election in 1879, and Harris Plaisted's election in 1880); Me. S., Legis. Manual 173–76 (Stevens & Sayward, Augusta, 1867) (detailing Maine election results from 1820 to 1866).

finisher being elected.[279] And in New Hampshire, between 1785 and 1913, 18 gubernatorial elections out of 112 were decided by the General Court (bizarrely, *also* 16% of all gubernatorial elections), 5 of which resulted in the second-place finisher being elected,[280] and a substantial number of Executive Councilors were similarly elected.[281]

The cumulative effect of the Senate being indirectly elected, and then in turn, participating in the indirect election of the Governor (*and* Executive Council in New Hampshire) is hard to measure. Take, for example, the 1846 elections in New Hampshire. In the race for Governor, the Democratic nominee won first place by a wide margin, but barely fell short of winning an outright majority:[282]

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|---|---|---|---|
| Jared W. Williams | Democratic Party | 26,740 | 48.45% |
| Anthony Colby | Whig Party | 17,707 | 32.08% |
| Nathaniel S. Berry | Free Soil | 10,379 | 18.80% |
| Scattering | | 568 | 0.67% |

The Whig–Liberty Party–Independent Democrat coalition nonetheless elected Colby as Governor;[283] then elected 2 out of 5 Executive Councilors, achieving a workable majority on the Council in the process;[284] elected a Liberty Party candidate and an Independent Democrat to the U.S. Senate;[285] elected an Independent Democrat as Speaker;[286] and then filled 7 out of 12 Senate seats.[287] But forming that coalition brought together members of three parties with different ideologies—though perhaps some shared sense of opposition to slavery—and may not have been what the voters of New Hampshire intended. Though there are little contemporary records suggesting that the actions of the 1846 General Court damaged the integrity of the State's democratic institutions, it's certainly no stretch to suggest that it might have—or, at the very least, that it incentivized (or provided a roadmap for) similar behavior in the future. Indeed, in the 1847 elections the following year, the voters ousted the governing coalition and replaced them with a solidly Democratic

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279 *See* GUIDE TO U.S. ELECTIONS 1639–40 (Deborah Kalb ed., 7th ed. 2016).

280 *See id.*

281 *See* HOSEA B. CARTER, THE NEW HAMPSHIRE MANUAL FOR THE GENERAL COURT, WITH COMPLETE OFFICIAL SUCCESSION, 1680–1891, at 122–25 (Carter ed., 1891) (listing Executive Council composition from 1784 to 1891) [hereinafter "RED BOOK"].

282 *Id.* at 154.

283 MITCHELL, *supra* note 228, at 29.

284 *Whig Councillors*, *supra* note 230, at 1; *see also* 1846 Senate Journal, *infra* note 300, at 34–35.

285 MITCHELL, *supra* note 228, at 29.

286 *See id.*

287 *All Hale*, *supra* note 230, at 2.

government.[288]

In short, while this Article doesn't do an in-depth examination of the legislation passed and public policies advanced by General Courts with disproportionately indirectly elected senates, it's clear that the indirect election damaged these states' norms and institutions to a certain degree. Doing so clearly wasn't in any state's interest and this value wasn't served by indirect election.

4. Avoiding Parochial Interests

One of the most persuasive interests arguably advanced by indirect election, especially in a Senate selected on a statewide basis with loose geographic requirements, is the avoidance of parochial interests. This interest functions similarly to advancing the state's long-term interests, but functions differently in practice. The latter was about acting in the best interest of the state, which is more connected to the state's abstract interest in the perpetuation and continuation of its own legitimacy—but avoiding parochial interests is about basing policy on broader, statewide concerns rather than based on regional concerns.

It's certainly possible that an indirectly elected senate, more accountable to the people's representatives than to the people themselves, might be less likely to pursue policies favored by their districts—thereby encouraging a form of healthier, broader policymaking—because they need not point to specific accomplishments to win re-election. And while there's no suggestion in the available record that any of the senates *did* advance regional parochial interests, there *is* evidence that they did advance another sort of parochial interests, namely, *partisan* parochial interests.

The conclusion that the Senate's composition frequently acted to advance partisan interests over broader interests is supported by the extent to which partisanship affected the General Court's decisions in filling vacancies. But more persuasive support comes by considering how single-mindedly parties and their leading politicians were willing to trade favors to each other to advance their own interests. As the 1846 election in New Hampshire showed, it was entirely possible for each member of a coalition government to get something—one party gets the governorship, another the speakership, another a U.S. Senate seat, and another control of the State Senate.[289] And that sort of deal-making wasn't restricted to 1846—in some form, it showed itself in 1871, when Democrats formed a coalition with Labor Reformers to elect a Democrat as Governor, a Labor Reformer as

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[288] DUBIN, *supra* note 25, at 121 (noting that the 1847 New Hampshire House was 146–136 Democratic, and the Senate was 11–1 Democratic).

[289] *See supra* notes 228-230, 282-287, and accompanying text (discussing 1846 elections).

Speaker, and a bipartisan coalition to fill Senate vacancies;[290] and in 1913, when Democrats joined with Progressive Republicans to elect a Democrat as Governor, a Progressive Reformer as Speaker, and Democrats to the State Senate.[291] It also showed itself in Massachusetts in 1844, when a loose coalition developed among the Liberty Party and the Democrats to fill Senate vacancies and elect a governor,[292] and again in 1851 and 1852, when Democrats and Free Soilers formed a governing coalition.[293] And in 1853, 1854, and 1855 in Maine, renegade Democrats, the Whig Party, and Free Soilers formed coalitions of differing stability, which elected governors, U.S. Senators, and state senators each time.[294]

The decisions by any of those coalitions in filling Senate vacancies were necessarily limited by the available choices. Because all three constitutions limited vacancy-filling by virtue of failure to elect to the top two candidates, the coalitions had limited choices for Governor and for filling state senate vacancies. Accordingly, it made sense for the coalition to divvy up the available positions with those realities in mind.[295] In other words, where a party in a coalition was ineligible to have its candidates selected to fill Senate vacancies, it may receive another prize, like a U.S. Senatorship, a legislative leadership position, or a legislatively elected position, like

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290 *See supra* notes 151-155, 244-253 (discussing 1871 elections).

291 *See supra* note 256, 255, and accompanying text (discussing 1912 elections).

292 *See supra* note 232 and accompanying text (discussing 1844 coalition).

293 *See supra* notes 237-241 and accompanying text (discussing 1851 and 1852 coalitions).

294 *See supra* notes 233-236 and accompanying text (discussing the 1853, 1854, and 1855 coalitions).

295 This is precisely how the 1851 Democratic–Free Soil coalition in Massachusetts divvied up the available positions. The Free Soilers "appointed a twelve-man committee to confer with a Democratic committee to decide upon the election of Governor, Lt. Governor, nine Councillors, Secretary of State, Treasurer, Auditor, Sergeant-at-Arms, and United States Senators for both terms. . . . The firm Democratic demands called for the Lt. Governor, five Councillors, the Treasurer, and the short-term Senator; the Free Soilers could have the Secretary of State, four Councillors, the Auditor, and the Sergeant-at-Arms. . . . At last the Democratic terms were adopted by the Free Soilers with only one dissenting vote . . . . A day or two later the Free Soilers even went so far as to oblige the Democrats by giving them an extra Councillor for the Suffolk District to maintain peace and harmony." McKay, supra note 238, at 348–49. At their 1851 state convention, the Whigs pilloried the Democrats for dividing up the spoils: "The great work of the session was the barganing [sic] for offices among minority candidates;—Governor and Lieutenant Governor, Secretary of State, and Councillors, President of the Senate and Speaker of the House, United States Senators for the short or the long term, together with the State Senators to fill the vacancies,—these were the prizes, ranged as it were in a row, ticketed and valued at such a rate; such and such offices to one action, considered as equivalent to such offices to the other;—all deliberately bargained for in the different caucuses[.]" *Address of the Whig State Convention*, Fall River Monitor, Sept. 20, 1851, at 1.

Secretary of State.[296] But there's no suggestion in any of these coalition negotiations that each position be filled with the most qualified or competent candidate. Instead, the selections were based just on what options were available. In so doing, the Senate's indirect election, instead of encouraging the abandonment of parochial interests, *enabled* the parties to pursue them more transparently.

5. Avoiding Corruption

This interest requires little discussion at this point—it's fairly obvious from the discussion of the preceding interests that corruption certainly wasn't *avoided* by having indirectly elected senates, and was likely *aided*. Party coalitions traded favors in exchange for filling vacancies;[297] when session vacancies occurred, the parties in control traded favors with perennial candidates to avoid handing seats to the opposition;[298] and both parties actively worked to degrade each state's democratic norms and system of checks and balances in attempts to gain momentary advantages over each other.

### *B. The Impact on the State's System of Checks and Balances*

In short, even assuming that the five interests previously identified—balancing the state house, creating a well-qualified body, advancing the state's long-term interests, avoiding parochial interests, and avoiding corruption—were legitimate, they were certainly not served by the method of indirect election provided by the constitutions of Maine, Massachusetts, and New Hampshire. Instead, these systems served to undermine each state's democratic institutions and system of checks and balances. While this has been discussed at some length above, it is worth exploring and discussing further the extent to which these models wrought havoc on the basic system of government that the states adopted.

The biggest difficulty with the scheme is the two-step process it employed: allowing the Senate to determine *when* there was a vacancy, and then allowing the legislature to fill it. This process provided different state actors with perverse incentives. Because the Senate was the judge of its own elections, and oversight by the courts over that quasi-judicial decision-making was somewhat lacking,[299] the

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296 *See, e.g.*, *supra* notes 229, 237, 295 and accompanying text.

297 *See supra* Part III.A.4.

298 *See supra* notes 149-155, 168-172, and accompanying text.

299 This was assuredly more the case in New Hampshire than in Maine or Massachusetts. In New Hampshire, it Supreme Court noted in *Brown v. Lamprey* that the New Hampshire Constitution "makes the Senate a *judicial body* for the determination of the election of its members and, at least in the absence of a denial of due process of law, the decision is 'final.'" 106 N.H. 121, 124 (1965)

senates were free to do whatever suited the interests of its majority. Where it was in the Senate's interest to find a failure to elect, it could find one, by adding or subtracting votes. It could do the exact same thing where it was in the Senate's interest to *not* find a failure to elect.[300]

This power could be countered, at least to some degree, by the constitutional power of the Governor and Executive Council in each state to inspect the votes, report the results to the legislature, and issue summonses to the winners.[301] If they made a mistake—or if they believed that some votes should be rejected because they were improperly cast—their reported total might include more or fewer votes for a

(quoting *In re Dondero*, 94 N.H. 236, 238 (1947)) (emphasis added). Though the Maine Supreme Court exercised, at least theoretically, more oversight over how Maine State Senate vacancies were filled, *see generally In re* Opinion of the Justices, 35 Me. 563 (1854) (holding that the Maine Legislature could not selectively fill vacancies), it clearly fell short of ensuring that basic principles of representation were upheld, *see generally In re* Opinion of the Judges, 7 Me. 483 (1830) (holding that both chambers of the legislature must agree to fill vacancies).

[300] *E.g.*, S. J., Gen. Sess. 7–8 (N.H. 1833) (counting votes cast for "William Lovell" as for "Warren Lovell") [hereinafter 1833 Senate Journal]; S. J., Gen. Sess. 26–27 (N.H. 1835) (counting votes cast for "Israel Hunt" as for "Israel Hunt, Jr.") [hereinafter 1835 Senate Journal]; S. J., Gen. Sess. 68 (N.H. 1845) (excluding results from the town of Orford in District 11, which would've resulted in the majority winner not actually receiving a majority) [hereinafter 1845 Senate Journal]; S. J., Gen. Sess. 45 (N.H. 1846) (correcting error that deprived candidate of 45 votes, which meant that there was no majority) [hereinafter 1846 Senate Journal]; 1889 Senate Journal, *supra* note 217, at 4, 10, 13–14 (not counting votes cast for "John A. Fall" as for "John F. Hall"); S. J., Gen. Sess. 12, 15 (N.H. 1891) (declining to correct votes for third-party candidate, the correction of which would have denied the winner a majority).

[301] All three constitutions included virtually the same language and the same grant of power. ME. CONST. art. IV, pt. II, § 4 (1819) ("The Governor and Council shall, as soon as may be, examine the returned copies of such lists, and, twenty days before the said first Wednesday of January, issue a summons to such persons, as shall appear to be elected by a majority of the votes in each district, to attend that day and take their seats."); MASS. CONST. pt. II, ch. I, § 2, art. III (1780) ("And that there may be a due convention of Senators on the last Wednesday in May annually, the Governor with five of the Council, for the time being, shall, as soon as may be, examine the returned copies of such records; and fourteen days before the said day, he shall issue his summons to such persons, as shall appear to be chosen by the majority of voters, to attend on that day, and take their seats accordingly[.]"); N.H. CONST. pt. II, § 33 (1792) ("And that there may be a due meeting of senators on the first Wednesday of June annually, the Governor, and a majority of the Council for the time being, shall as soon as may be, examine the returned copies of such records [of votes], and fourteen days before the first Wednesday of June, he shall issue his summons to such persons as appear to be chosen Senators, by a majority of votes, to attend and take their seats on that day.").

candidate than they actually received.[302] That omission or addition might give a candidate an artificial majority where one did not otherwise exist, or a mere plurality where a majority would have otherwise existed.

But while this was unequivocally the power of the Governor and Executive Council of New Hampshire,[303] subsequent events made clear that the Governor and Executive Council of *Maine* had no such power. In 1879, Democratic Governor Alonzo Garcelon ran for re-election and placed third—but because no candidate received a majority, Garcelon had a chance of nonetheless winning a second term. It appeared as though Republicans had won a narrow majority in both houses of the legislature, which would've enabled them to elect their nominee as governor.[304] But Garcelon and the Democratic-controlled Executive Council, perhaps following in Weston's footsteps, disqualified votes with zeal—both for "inaccurate" candidate names (specifically in the form of abbreviations) and for a lack of strict compliance with certification requirements.[305] Republicans went to the Maine Supreme Judicial Court, which concluded that the Governor and Executive Council had no authority to disqualify votes.[306] Garcelon defied the court's opinion, however, and issued certificates to his declared winners, a coalition of Democrats and Greenbackers.[307] The Republicans and the coalition each organized separate legislatures, and both requested an advisory opinion from the court as to which was legitimate.[308] The Supreme Judicial Court again sided with the Republicans, concluding that

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[302] *E.g.*, 1846 Senate Journal, *supra* note 300, at 45; *supra* notes 197-205 and accompanying text (discussing 1875 action by the Governor and Executive Council to reject votes).

[303] *Supra* note 205 and accompanying text.

[304] FOLEY, *supra* note 139, at 165.

[305] *Id.*

[306] *In re* Opinion of Justices, 70 Me. 560, 565–67 (1879) (citations omitted) ("The governor and council must act upon the returns forwarded to the secretary of state. If they purport to be made signed and sealed up in open plantation or town meeting, they constitute the basis of the action of the canvassing board. No provision is found in the constitution or in any statute of this state, by virtue of which they would be authorized to receive evidence to negative the facts therein set forth. They, therefore, have no such power. . . . The statue prohibits the rejection of the ballot, 'after it is received into the ballot box.' It is then to be counted. The governor and council have nothing to do with the question. Their duty is to count the votes, regardless of the fact improperly set forth in the return. They are nowhere constituted a tribunal with judicial authority to determine what shall constitute a distinguishing mark or figure, nor can they legally refuse 'to open and count the votes returned.' When the ballot has been once received in the ballot box, neither the selectmen nor the governor and council can refuse to count it.").

[307] FOLEY, *supra* note 139, at 166.

[308] *Id.* at 166–67.

Garcelon's actions "rob[bed] the people of the legislature they have chosen, and forces upon them one to serve [the governor's] own purposes."[309] The coalition legislature eventually yielded to the force of law, and the Republican candidate served as Governor.[310] The entire debacle resulted in the abolition of the majority requirement for gubernatorial elections.[311]

But even assuming that the executive branch's power in all three states reached to the extent recognized by the New Hampshire Supreme Court, the power itself was a bit hollow. It only extended so far—the Senate could, in turn, as the judge of its elections, take those results and make additions or subtractions to it based on *its* own sense of which votes were and weren't properly cast, and could similarly create or eliminate majorities.[312] So while the Senate's power was, at least *theoretically*, checked by the power enjoyed by the executive branch, those checks were illusory in practice.

And the senates certainly took full advantage of their power—whether identified as quasi-judicial power or just an inherent power of a legislature—to rewrite election results. The Senate, as the judge of its own elections, could solve the problems associated with voice votes and imperfect compliance with state regulatory requirements however it liked, and however *inconsistently* it liked. Some years, for example, it might conclude that the voters voting for the wrong candidate were acting in good faith and were simply mistaken, and so votes for "William Lovell" should count for *Warren* Lovell, or votes for "Israel Hunt" should count for Israel Hunt, Jr.[313] But in other years, they might conclude that even though votes cast for "Natt Head" were intended to be cast for *Nathaniel* Head and votes cast for "G. E. Todd" were intended to be cast for *George E.* Todd, those votes should be rejected "on the ground that they . . . did not contain the full Christian name of the candidate voted for."[314] Similarly, they might choose to not count votes cast for "John A. Fall" as properly for John F. Hall.[315]

In Massachusetts, because candidates ran in multi-member districts,

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309 *In re* Opinion of Justices, 70 Me. 570, 586–87 (Me. 1880).

310 FOLEY, *supra* note 139, at 167–68.

311 *Id*. at 168.

312 In 1846, for example, the Governor and Executive Council of New Hampshire recorded the second-place finisher as receiving 45 fewer votes than the Senate felt was accurate, and so the Senate corrected the error. *See* 1846 Senate Journal, *supra* note 300, at 45. The historical record doesn't suggest which interpretation of the results is correct.

313 1833 Senate Journal, *supra* note 300, at 7–8; 1835 Senate Journal, *supra* note 300, at 26–27.

314 *In re* Opinion of the Justices, 56 N.H. 570, 572 (N.H. 1875).

315 1889 Senate Journal, *supra* note 217, at 4, 10, 13–14.

identifying the eligible candidates to fill the vacancies was particularly crucial. If the Senate plurality was able to include, or exclude, enough votes to alter the eligible candidates, it could queue up a Senate selection by the General Court that would have two eligible candidates of the same party. In 1808, for example, there was a question about whether votes cast for "Ammi Mitchell" should count for "Ammi Ruhami Mitchell." [316] After concluding that there were no other citizens in Cumberland or Oxford counties with that name, the Senate included the votes. Had they not done so, the vacancy in the district would've been filled by either James Means or Levi Hubbard, both Democratic–Republicans.[317] Mitchell was a Federalist, however[318]—so it was little surprise that the Federalists, who held a narrow majority in both chambers of the General Court, opted to include the votes, make Mitchell an eligible candidate, and ultimately pick him to fill the vacancy.[319]

This method of determining for whom votes were meant to be cast—canvassing the district to see if someone else had the same name—was a reasonable system, even if applied to the Federalists' benefit in 1808. But the General Court didn't use it again. In 1815, the Senate included votes count for "Charles Turner" as properly cast for Charles Turner, Jr., guaranteeing that a Senate vacancy in Plymouth County would be filled by a Democratic–Republican—but without canvassing the district.[320] Similarly, in 1817, the Federalist majority opted not to count the votes received by Democratic–Republican Caleb Hyde in town of Pittsfield because they were all cast for "C. Hyde," even though the intent of the voters was clear. This, in turn, triggered

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316 *Massachusetts 1808 State Senate, Cumberland and Oxford Counties*, Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/cr56n1142 [https://perma.cc/A5SA-HN6E] [*hereinafter 1808 Massachusetts State Senate Election*].

317 *Id*.

318 *Id*.

319 Dubin, *supra* note 25, at 91 (showing that Federalists ended up with a 253–231 majority in the State House and a 23–17 majority in the State Senate in 1808); *1808 Massachusetts State Senate Election*, *supra* note 316 (noting the candidates' party affiliation); *Massachusetts 1808 State Senate, Cumberland County, Special*, Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/v979v457q [https://perma.cc/5B8X-PUY3] (noting the results of the joint convention to fill the senate vacancy).

320 *Massachusetts 1815 State Senate, Plymouth County*, Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/dn39x191k [https://perma.cc/2ZDX-AKUG].

a vacancy, which was in turn filled by Federalists.[321] Finally, in 1837, the Senate Elections Committee recommended counting votes cast for "Robert Rantoul" as properly cast for Robert Rantoul, Jr.,[322] even though, as a state senator pointed out, "to determine [this] without evidence was going a very great length, especially when we know that there is now residing in that Senatorial District a *Robert Rantoul*, who has actually been a Senator in this body, and is still eligible as a Senator." The senator noted that the committee's decision to do so was justified, but pointed out the hypocrisy of the committee in initially proposing that returns be rejected because they weren't properly addressed.[323]

This wasn't all that the senates did, however. Their ability, and decisions, to revisit the recorded vote—by granting or denying recounts, or including or excluding votes that were erroneous or improperly recorded—varied greatly depending on who brought the error to the Senate's attention. When losing candidates, especially those nominated by the minority party, attempted to petition the Senate for a recount or an investigation into potentially erroneous results, the Senate always denied those efforts.[324] In one instance, a losing candidate in New Hampshire contested an election where the winning candidate (who was affiliated with the Senate majority) appeared to win a majority of the vote. Rather than allowing an investigation into the results, which may have shown that the majority party candidate was constitutionally ineligible for the seat, the Senate declared a vacancy and the entire legislature elected the majority party candidate anyway.[325]

But when errors affected the *majority* party, the Senate quickly moved to address the problem. Some years, this meant including results that had been omitted as the result of a "mistake," which *deprived* the winning candidate of a majority, threw the election to the legislature, and elected a majority-party senator.[326] Other years, it made the opposite decision: votes weren't included

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[321] *Massachusetts 1817 State Senate, Berkshire County*, Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/5712m7199 [https://perma.cc/N6KF-U4MM].

[322] S. Rep. 4, at 4 (Mass. 1837).

[323] *Berkshire Senators*, *supra* note 207, at 1. For a greater discussion of the 1837 issue, *see supra* notes 206-207 and accompanying text.

[324] *See supra* notes 212-216 and accompanying text (discussing Republican Senate majority's refusal to allow Democrat John Hall to receive a recount in 1887); *supra* notes 137, 139 (discussing Republican Senate majority's refusal to allow Democrats John Hall and George Brown to receive recounts in 1889).

[325] *See supra* notes 208-211 (discussing Republican Senate majority's refusal to allow Democrat Marcellus Eldredge to challenge election results).

[326] *E.g.*, 1846 Senate Journal, supra note 300 at 45.

because of technical noncompliance on the part of city recorders or because some votes were improperly recorded, and *that* exclusion enabled the leading candidate to win a majority.[327] Even more egregiously, the majority in the Senate would sometimes exercise its power to remove an incumbent state senator from office after he had been sworn in because of election irregularities.[328]

Similarly, because of the predictability with which vacancies would be filled,[329] all state actors had a vested interest in either triggering the constitutional mechanism for filling a vacancy or avoiding it altogether. While the power to judge elections was theoretically granted to the Senate, for all practical purposes, it resided with the Senate *majority*—so long as a majority of state senators adopted a certain position, regardless of its consistence with past practices, they could outvote the minority and adopt an official position. Accordingly, where the Senate majority was confident that the entire legislature would fill a vacancy with a candidate who would pad its majority, it had every reason to determine that vacancies existed and bounce the election to the convention. But, on the other hand, where the Senate *didn't* have that confidence, perhaps because different parties controlled each chamber, it had every reason to determine that vacancies *didn't* exist and keep the election away from the convention.[330]

These realities necessarily implicated the separations of powers principles underlying the organization of state government. When state actors, relying on their constitutional grant of power, manipulate facts in a way that maximizes their own power and minimizes the power of *other* state actors, the state faces fundamental questions surrounding the legitimacy of elections and of the strength of its institutions. These problems, in other circumstances, would surely have triggered judicial intervention, and only didn't here if done in total compliance with

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[327] *E.g.*, 1845 Senate Journal, supra note 300, at 68.

[328] S. J., 51ST LEG., 1st Reg. Sess. 111–14, 140 (Me. 1872) (removing John Moore from the State Senate and replacing him with William Hadlock); *see also* S. J., 1st Reg. Sess. 43–44, 46, 48, 52 (N.H. 1846) (removing William Gage from the Senate, declaring a vacancy, and electing Andrew Taylor in his place).

[329] *See supra* Part II.B.2 (arguing that vacancies were filled in accordance with the General Court's partisan affiliation).

[330] To some extent, these dueling motivations didn't disappear with the abolition of legislative vacancy-filling. After the state's constitution was amended in 1912 to provide for special elections, the Senate still had the ability to judge its own elections. In 1963, this power was extended to declare the votes for several minority-party senators invalid and to instead declare the losers from those elections the rightful senators. (The state supreme court declined to intervene.) It wasn't until a constitutional amendment was adopted two years later that this power was severely restricted.

the letter of the state constitution. But that judicial abstention, even if technically appropriate, formalized the coups and power thefts and provided the legislature with a great deal of urgency to rush to fill Senate vacancies and put an end to any pending litigation. Even assuming that the aforementioned interests served by indirect election were legitimate, *and* assuming that they actually were served, the level to which the basic system of government was undermined is indefensible in practice.

### *C. The Modern Relevance*

While it is undoubtedly helpful and illuminating to lay out the history of an as-yet underdiscussed political process, telling the story of failures of American democracy in the process, one might reasonably wonder why it is relevant in the twenty-first century. To some extent, this misses the point—a thorough examination of how American democracy actually functioned in the era preceding one-person-one-vote, the incorporation of the Equal Protection Clause to the states, and the ratification of the Seventeenth Amendment *does* have inherent value. But there is modern relevance, too, in two forms: (1) this history better contextualizes Progressive Era reforms, like the Seventeenth Amendment and the adoption of same-party legislative appointment schemes; and (2) it serves as a warning sign for those who seek the repeal of the Seventeenth Amendment and for those states with vacancy-filling procedures that come uncomfortably close to New England's.

First, the Progressive Era reforms adopted in the twilight of the New Hampshire model can be better understood in light of how these three states' model worked. Advocates of direct election of U.S. Senators, for example, operated with the practical understanding of how poorly state legislatures elected Senators. But given the indirect electoral systems at play in Kentucky, Maine, Maryland, Massachusetts, and New Hampshire, it is difficult to imagine that reformers weren't operating with *those* examples in their minds, as well. That's especially true for Maine and New Hampshire—the former only required special elections to fill Senate vacancies in 1899, and the latter did so in 1913, just months before the Seventeenth Amendment was ratified.

As has been explained before, the Seventeenth Amendment doesn't just provide for the direct election of U.S. Senators; it also provided a new method for filling vacancies in the Senate. The Amendment's language is somewhat unclear:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may

direct.[331]

Though some modern constitutional scholars have opined that this language is broadly supportive of immediate special elections with no room for restrictions on how governors can make interim Senate appointments, their discussion solely focuses on how *U.S.* Senators were elected prior to the modern era and excludes any discussion of how *state* senators were so elected. The historical picture, therefore, is cropped in a manner that excludes the highly relevant history of the New Hampshire State Senate.

Moreover, the adoption of same-party appointment schemes to fill state legislative vacancies, which began around the time that the New Hampshire system was abolished, can be better contextualized by New Hampshire, too—as well as by Maine and Massachusetts. Excluding them, the default mechanism for filling state legislative vacancies prior to 1913 was to require special elections. But around the time that the Seventeenth Amendment was ratified, states began moving to legislative appointment systems. These systems facially mirrored New Hampshire's—opting for temporary appointments rather than special elections—but, reflecting the shift in state constitutional law at the time, vested governors, county commissions, and state parties with the appointment power rather than the legislature. Considering the brief temporal overlap between the abolition of the New Hampshire model and the adoption of these schemes by a number of states—including neighboring Vermont in 1914—these states clearly viewed the New England method of filling vacancies as containing *some* merit. Accordingly, it may well be the case that these states turned to New England as a rough starting point, and then made their own additions.

Second, telling the story of New England should serve as a warning sign. Beginning with the Tea Party movement in the late 2000s, repealing the Seventeenth Amendment and returning to an indirectly elected U.S. Senate became popular among some fringe groups.[332] Their arguments echo many of those originally advanced, both by the Founding Fathers and the framers of state constitutions, several centuries ago.[333] These arguments have learned nothing from the failure of indirect election at the federal level, and they are likely unaware of the failure of indirect election at the state level. Reconsidering the interests allegedly

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[331] U.S. CONST. amend. XVII.

[332] *E.g.*, David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1088–90 (2014); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U.L. REV. COLLOQUY 300, 306–08 (2011).

[333] *Compare* Schleicher, *supra* note 332, at 1088–90 (discussing anti-Seventeenth Amendment arguments), *with* Part I, *supra*.

served by indirect election in the context of New England, and the conclusion that the asserted interests were wholly undermined, should play a role in the robust defense of the Seventeenth Amendment and should concern those who push for its repeal.

On the other hand, given that more than half of the states in the United States have some form of temporary legislative appointments used to fill legislative vacancies,[334] the history of the New England model should inspire reconsideration of those systems, too. To be clear, this reconsideration should not push in the direction of requiring special elections, which are all-too-frequently undemocratic affairs,[335] but rather in the form of making appointment schemes work better. States that provide for appointments without same-party requirements,[336] and without allowing the voters to weigh in on the selection in a timely manner, sometimes come dangerously close to the New England model. Legislators in those states, who joke with each other "to drive safely, because remember, the governor has the power to appoint,"[337] run the risk of their seat flipping to the other party if they voluntarily or involuntarily vacate their seat. A seat flipping control under those circumstances presents grave concerns of a state's democratic legitimacy, and if it occurs too frequently, it can present the same problems that New England's system did. Accordingly, the history of New England's model should serve as a warning to those states.

## IV. CONCLUSION

In 1780, 1784, and 1819, respectively, Massachusetts, New Hampshire, and Maine adopted a system of electing their senates that effectively made the bodies indirectly elected. The system's ancestors traced back to the Maryland Constitution of 1776, and a cousin of the New England system included the indirect election of U.S. Senators prior to the Seventeenth Amendment. These systems of indirect election were adopted with the promise that they would ultimately serve the state's interests by tempering the will of the people and creating long-term stability.

But measured against any of these interests, the New England model failed. It

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334 Yeargain, *supra* note 22, at 565.

335 *See* Yeargain, *supra* note 262 (discussing the arguments in favor of legislative appointment schemes generally and against special elections).

336 Yeargain, *supra* note 22, at 565; Yeargain, *supra* note 262.

337 Tim Anderson, *Midwest's States Take Different Approaches to Filling Legislative Vacancies*, Council of State Gov'ts (Sept. 18, 2018, 12:16 PM), https://knowledgecenter.csg.org/kc/content/midwests-states-take-different-approaches-filling-legislative-vacancies [https://perma.cc/UP4C-742A].

resulted in an upper legislative body that hardly ever reflected the will of the people, and provided political parties with an active incentive to manipulate the rules and reverse-engineer a legislative majority in practice where they might not have won one at the ballot box. Its composition, and the lessons learned from it, run parallel to the experience that states all around the country had with indirectly elected U.S. Senators, and was likely abolished for similar reasons.

The history of this system, and the lessons learned from it, provide lasting proof of the value of directly electing legislators and matching voter intent with representation. In an era in which American democratic institutions—like the Electoral College, the U.S. Senate, and gerrymandered legislatures—are facing challenges in democratizing and making every vote count equally, we should be heartened by the ultimate abolition of the New England model.

## *APPENDIX A: TABLE OF SENATE VACANCIES IN MAINE, 1820–1899*

| Year | Failure to elect | Percentage of all seats | Plurality winner selected | Session vacancies | Total vacancies |
|---|---|---|---|---|---|
| 1820 | 4 | 20.00% | 3 | 3 | 7 |
| 1822 | 4 | 20.00% | 2 | 0 | 4 |
| 1823 | 1 | 5.00% | 1 | 0 | 1 |
| 1824 | 5 | 25.00% | 3 | 0 | 5 |
| 1825 | 0 | 0.00% | n/a | 1 | 1 |
| 1826 | 3 | 15.00% | 2 | 1 | 4 |
| 1827 | 1 | 5.00% | 0 | 0 | 1 |
| 1828 | 2 | 10.00% | 1 | 0 | 2 |
| 1829 | 2 | 10.00% | 2 | 1 | 3 |
| 1830 | 2[338] | 10.00% | n/a | 0 | 2 |
| 1831 | 0 | 0.00% | n/a | 0 | 0 |
| 1832 | 0 | 0.00% | n/a | 1 | 1 |
| 1833 | 0 | 0.00% | n/a | 0 | 0 |
| 1834 | 1 | 4.00% | 1 | 1 | 2 |
| 1835 | 2 | 8.00% | 1 | 0 | 2 |
| 1836 | 1 | 4.00% | 0 | 0 | 1 |
| 1837 | 3 | 12.00% | Unknown[339] | 0 | 3 |
| 1838 | 1 | 4.00% | Unknown | 1 | 2 |
| 1839 | 1 | 4.00% | Unknown | 0 | 1 |
| 1840 | 0 | 0.00% | n/a | 0 | 0 |
| 1841 | 1 | 3.23% | 1 | 0 | 1 |
| 1842 | 2 | 6.45% | 0 | 2 | 4 |
| 1843 | 6 | 19.35% | 5 | 0 | 6 |
| 1844 | 6 | 19.35% | 5 | 0 | 6 |
| 1845 | 8 | 25.81% | 6 | 0 | 8 |
| 1846 | 11 | 35.48% | 8 | 0 | 11 |
| 1847 | 19 | 61.29% | 10 | 1[340] | 20 |

[338] The Senate tied, 8–8, on whether to fill this vacancy and it was not filled. *Supra* notes 176-184 and accompanying discussion.

[339] For years marked with "unknown," the election vote totals were not available.

[340] This vacancy occurred in a seat that had already been filled by the legislature.

| | | | | | |
|---|---|---|---|---|---|
| 1848 | 11 | 35.48% | 5 | 1 | 12 |
| 1849 | 18 | 58.06% | 13 | 0 | 18 |
| 1850 | 6 | 19.35% | Unknown | 0 | 6 |
| 1851 | 16 | 51.61% | Unknown | 1[341] | 17 |
| 1853[342] | 8 | 25.81% | Unknown | 2 | 10 |
| 1854 | 15 | 48.39% | Unknown | 0 | 15 |
| 1855 | 10 | 32.26% | 7 | 0 | 10 |
| 1856 | 5 | 16.13% | 1 | 0 | 5 |
| 1857 | 0 | 0.00% | n/a | 0 | 0 |
| 1858 | 0 | 0.00% | n/a | 1 | 1 |
| 1859 | 2 | 6.45% | 0 | 0 | 2 |
| 1860 | 0 | 0.00% | n/a | 0 | 0 |
| 1861 | 0 | 0.00% | n/a | 1 | 1 |
| 1862 | 0 | 0.00% | n/a | 0 | 0 |
| 1863 | 2 | 6.45% | 2 | 1 | 3 |
| 1864 | 0 | 0.00% | n/a | 1 | 1 |
| 1865 | 0 | 0.00% | n/a | 0 | 0 |
| 1866 | 0 | 0.00% | n/a | 1 | 1 |
| 1867 | 0 | 0.00% | n/a | 0 | 0 |
| 1868 | 1 | 3.23% | 0 | 0 | 1 |
| 1869 | 0 | 0.00% | n/a | 0 | 0 |
| 1870 | 0 | 0.00% | n/a | 0 | 0 |
| 1871 | 0 | 0.00% | n/a | 0 | 0 |
| 1872 | 1 | 3.23% | 1 | 0 | 1 |
| 1873 | 0 | 0.00% | n/a | 0 | 0 |
| 1874 | 0 | 0.00% | n/a | 0 | 0 |
| 1875 | 0 | 0.00% | n/a | 0 | 0 |
| 1876 | 1 | 3.23% | 1 | 0 | 1 |
| 1877 | 0 | 0.00% | n/a | 0 | 0 |
| 1878 | 0 | 0.00% | n/a | 0 | 0 |
| 1879 | 0 | 0.00% | n/a | 0 | 0 |

[341] This vacancy was not filled.

[342] The legislature elected in 1850 served a two-year term.

| | | | | | |
|---|---|---|---|---|---|
| 1880 | n/a[343] | n/a | n/a | 0 | 0 |
| 1881[344] | n/a | n/a | n/a | 0 | 0 |
| 1883 | n/a | n/a | n/a | 0 | 0 |
| 1885 | n/a | n/a | n/a | 0 | 0 |
| 1887 | n/a | n/a | n/a | 0 | 0 |
| 1889 | n/a | n/a | n/a | 0 | 0 |
| 1891 | n/a | n/a | n/a | 0 | 0 |
| 1893 | n/a | n/a | n/a | 0 | 0 |
| 1895 | n/a | n/a | n/a | 0 | 0 |
| 1897 | n/a | n/a | n/a | 0 | 0 |
| 1899 | n/a | n/a | n/a | 0 | 0 |

[343] The Maine Constitution was amended in 1879 to no longer require a majority vote for state senate elections.

[344] Maine shifted from one-year to two-year terms for its legislators, effective in 1881.

### *Appendix B: Table of Senate Vacancies in Massachusetts, 1781–1857*

| Year | Failure to elect | Percentage of all seats | Plurality winner selected[345] | Session vacancies[346] | Total vacancies |
|---|---|---|---|---|---|
| 1781 | 10 | 25.00% | Unknown | Unknown | 10 |
| 1782 | 8 | 20.00% | Unknown | Unknown | 8 |
| 1783 | 9 | 22.50% | Unknown | Unknown | 9 |
| 1784 | 8 | 20.00% | Unknown | Unknown | 8 |
| 1785 | 11 | 27.50% | Unknown | Unknown | 11 |
| 1786 | 7 | 17.50% | Unknown | Unknown | 7 |
| 1787 | 16 | 40.00% | Unknown | Unknown | 16 |
| 1788 | 9 | 22.50% | Unknown | Unknown | 9 |
| 1789 | 11 | 27.50% | Unknown | Unknown | 11 |
| 1790 | 7 | 17.50% | Unknown | Unknown | 7 |
| 1791 | 12 | 30.00% | Unknown | Unknown | 12 |
| 1792 | 12 | 30.00% | Unknown | Unknown | 12 |
| 1793 | 9 | 22.50% | Unknown | Unknown | 9 |
| 1794 | 13 | 32.50% | Unknown | Unknown | 13 |
| 1795 | 6 | 15.00% | Unknown | Unknown | 6 |
| 1796 | 5 | 12.50% | Unknown | 2 | 7 |
| 1797 | 9 | 22.50% | Unknown | Unknown | 9 |
| 1798 | 7 | 17.50% | Unknown | Unknown | 7 |
| 1799 | 10 | 25.00% | Unknown | Unknown | 10 |
| 1800 | 6 | 15.00% | Unknown | Unknown | 6 |
| 1801 | 11 | 27.50% | Unknown | Unknown | 11 |
| 1802 | 4 | 10.00% | Unknown | Unknown | 4 |
| 1803 | 4 | 10.00% | Unknown | Unknown | 4 |
| 1804 | 4 | 10.00% | Unknown | Unknown | 4 |
| 1805 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1806 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1807 | 0 | 0.00% | Unknown | Unknown | 0 |

[345] Because Massachusetts Senate journals and election results are inconsistently available, it is impossible to state with certainty how many plurality winners were selected.

[346] Again, because of the inconsistent of Massachusetts Senate journals, it is impossible to state with certainty how many session vacancies there were. Numbers are provided where known.

| | | | | | |
|---|---|---|---|---|---|
| 1808 | 3 | 7.50% | Unknown | Unknown | 3 |
| 1809 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1810 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1811 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1812 | 0 | 0.00% | Unknown | 4 | 4 |
| 1813 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1814 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1815 | 3 | 7.50% | Unknown | Unknown | 3 |
| 1816 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1817 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1818 | 3 | 7.50% | Unknown | Unknown | 3 |
| 1819 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1820 | 2 | 5.00% | Unknown | 1 | 3 |
| 1821 | 3 | 7.50% | Unknown | 2 | 5 |
| 1822 | 8 | 20.00% | Unknown | 0 | 8 |
| 1823 | 0 | 0.00% | Unknown | 1 | 1 |
| 1824 | 2 | 5.00% | Unknown | 0 | 2 |
| 1825 | 5 | 12.50% | Unknown | Unknown | 5 |
| 1826 | 3 | 7.50% | Unknown | Unknown | 3 |
| 1827 | 8 | 20.00% | Unknown | Unknown | 8 |
| 1828 | 4 | 10.00% | Unknown | Unknown | 4 |
| 1829 | 8 | 20.00% | Unknown | Unknown | 8 |
| 1830 | 6 | 15.00% | Unknown | Unknown | 6 |
| 1831 | 15 | 37.50% | Unknown | Unknown | 15 |
| 1832 | 9 | 22.50% | Unknown | Unknown | 9 |
| 1833 | 7 | 17.50% | Unknown | Unknown | 7 |
| 1834 | 20 | 50.00% | Unknown | Unknown | 20 |
| 1835 | 6 | 15.00% | Unknown | Unknown | 6 |
| 1836 | 2 | 5.00% | Unknown | Unknown | 2 |
| 1837 | 2 | 5.00% | Unknown | Unknown | 2 |
| 1838 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1839 | 17 | 42.50% | Unknown | Unknown | 17 |
| 1840 | 12 | 30.00% | Unknown | Unknown | 12 |
| 1841 | 4 | 10.00% | Unknown | Unknown | 4 |
| 1842 | 5 | 12.50% | Unknown | Unknown | 5 |
| 1843 | 16 | 40.00% | Unknown | Unknown | 16 |

| | | | | | |
|---|---|---|---|---|---|
| 1844 | 23 | 57.50% | Unknown | Unknown | 23 |
| 1845 | 14 | 35.00% | Unknown | Unknown | 14 |
| 1846 | 31 | 77.50% | Unknown | Unknown | 31 |
| 1847 | 17 | 42.50% | Unknown | Unknown | 17 |
| 1848 | 23 | 57.50% | Unknown | Unknown | 23 |
| 1849 | 23 | 57.50% | Unknown | Unknown | 23 |
| 1850 | 6 | 15.00% | Unknown | Unknown | 6 |
| 1851 | 8 | 20.00% | Unknown | Unknown | 8 |
| 1852 | 12 | 30.00% | Unknown | Unknown | 12 |
| 1853 | 22 | 55.00% | Unknown | Unknown | 22 |
| 1854 | 18 | 45.00% | Unknown | Unknown | 18 |
| 1855 | 1 | 2.50% | Unknown | Unknown | 1 |
| 1856 | 0 | 0.00% | Unknown | Unknown | 0 |
| 1857 | 0 | 0.00% | Unknown | Unknown | 0 |

## *APPENDIX C: TABLE OF SENATE VACANCIES IN NEW HAMPSHIRE, 1784–1913*

| Year | Failure to elect | Percentage of all seats | Plurality winner selected | Session vacancies | Total vacancies |
|---|---|---|---|---|---|
| 1784 | 5 | 41.67% | Unknown[347] | 0 | 5 |
| 1785 | 7 | 58.33% | Unknown | 0 | 7 |
| 1786 | 5 | 41.67% | Unknown | 0 | 5 |
| 1787 | 8 | 66.67% | Unknown | 0 | 8 |
| 1788 | 6 | 50.00% | Unknown | 0 | 6 |
| 1789 | 5 | 41.67% | Unknown | 0 | 5 |
| 1790 | 8 | 66.67% | Unknown | 1 (January 1791 Session) | 9 |
| 1791 | 4 | 33.33% | Unknown | 1 (November 1791 Session) | 5 |
| 1792 | 6 | 50.00% | Unknown | 0 | 6 |
| 1793 | 6 | 50.00% | Unknown | 1 (June 1793 Session)[348] | 7 |
| 1794 | 5 | 41.67% | Unknown | 2 (June 1794 Session) | 7 |
| 1795 | 6 | 50.00% | Unknown | 1 (June 1795 Session) | 7 |
| 1796 | 4 | 33.33% | Unknown | | 4 |
| 1797 | 5 | 41.67% | Unknown | 0 | 5 |
| 1798 | 6 | 50.00% | Unknown | 0 | 6 |
| 1799 | 4 | 33.33% | Unknown | 2 (December 1799 Session) | 6 |
| 1800 | 4 | 33.33% | Unknown | 1 (December 1800 Session)[349] | 5 |
| 1801 | 4 | 33.33% | Unknown | 0 | 4 |
| 1802 | 2 | 16.67% | Unknown | 0 | 2 |
| 1803 | 1 | 8.33% | Unknown | 1 (June 1803 session) | 2 |
| 1804 | 1 | 8.33% | Unknown | 0 | 1 |

347 From 1784 to 1832, Senate Journals did not report election results.

348 This vacancy occurred in a seat that had already been filled by the legislature.

349 This vacancy occurred in a seat that had already been filled by the legislature.

| | | | | | |
|---|---|---|---|---|---|
| 1805 | 1 | 8.33% | Unknown | 0 | 1 |
| 1806 | 2 | 16.67% | Unknown | 0 | 2 |
| 1807 | 1 | 8.33% | Unknown | 0 | 1 |
| 1808 | 2 | 16.67% | Unknown | 0 | 2 |
| 1809 | 0 | 0.00% | Unknown | 0 | 0 |
| 1810 | 0 | 0.00% | Unknown | 0 | 0 |
| 1811 | 1 | 8.33% | Unknown | 0 | 1 |
| 1812 | 2 | 16.67% | Unknown | 0 | 2 |
| 1813 | 0 | 0.00% | Unknown | 1 (October 1813 Session) | 1 |
| 1814 | 0 | 0.00% | Unknown | 0 | 0 |
| 1815 | 1 | 8.33% | Unknown | 0 | 1 |
| 1816 | 0 | 0.00% | Unknown | 2 (October 1816 Session)[350] | 0 |
| 1817 | 0 | 0.00% | Unknown | 0 | 0 |
| 1818 | 2 | 16.67% | Unknown | 0 | 2 |
| 1819 | 4 | 33.33% | Unknown | 0 | 4 |
| 1820 | 4 | 33.33% | Unknown | 1 (November 1820 Session) | 5 |
| 1821 | 2 | 16.67% | Unknown | 0 | 2 |
| 1822 | 1 | 8.33% | Unknown | 0 | 1 |
| 1823 | 2 | 16.67% | Unknown | 0 | 2 |
| 1824 | 1 | 8.33% | Unknown | 1 (June 1824 Session) | 2 |
| 1825 | 4 | 33.33% | Unknown | 1 (June 1825 Session)[351] | 5 |
| 1826 | 3 | 25.00% | Unknown | 0 | 3 |
| 1827 | 0 | 0.00% | Unknown | 0 | 0 |
| 1828 | 1 | 8.33% | Unknown | 1 (November 1828 Session)[352] | 1 |
| 1829 | 0 | 0.00% | Unknown | 0 | 0 |
| 1830 | 1 | 8.33% | Unknown | 1 (June 1830 Session) | 2 |

350 These vacancies were not filled. *Supra* notes 173-175 and accompanying text.

351 This vacancy was not filled.

352 This vacancy was not filled.

| | | | | | |
|---|---|---|---|---|---|
| 1831 | 0 | 0.00% | Unknown | 1 (June 1831 Session) | 1 |
| 1832 | 0 | 0.00% | Unknown | 0 | 0 |
| 1833 | 1 | 8.33% | 1 | 0 | 1 |
| 1834 | 0 | 0.00% | n/a | 0 | 0 |
| 1835 | 0 | 0.00% | n/a | 0 | 0 |
| 1836 | 0 | 0.00% | n/a | 0 | 0 |
| 1837 | 0 | 0.00% | n/a | 0 | 0 |
| 1838 | 0 | 0.00% | 0 | 1 (June 1838 Session) | 1 |
| 1839 | 0 | 0.00% | n/a | 0 | 0 |
| 1840 | 0 | 0.00% | n/a | 0 | 0 |
| 1841 | 1 | 8.33% | 1 | 0 | 1 |
| 1842 | 0 | 0.00% | n/a | 0 | 0 |
| 1843 | 3 | 25.00% | Unknown | 0 | 3 |
| 1844 | 3 | 25.00% | 1 | 0 | 3 |
| 1845 | 0 | 0.00% | n/a | 0 | 0 |
| 1846 | 7 | 58.33% | 4 | 0 | 7 |
| 1847 | 3 | 25.00% | 2 | 0 | 3 |
| 1848 | 1 | 8.33% | 0 | 0 | 1 |
| 1849 | 0 | 0.00% | n/a | 0 | 0 |
| 1850 | 1 | 8.33% | 1 | 0 | 1 |
| 1851 | 3 | 25.00% | 3 | 0 | 3 |
| 1852 | 2 | 16.67% | 0 | 0 | 2 |
| 1853 | 1 | 8.33% | 1 | 0 | 1 |
| 1854 | 2 | 16.67% | 2 | 0 | 2 |
| 1855 | 1 | 8.33% | 0 | 0 | 1 |
| 1856 | 0 | 0.00% | n/a | 0 | 0 |
| 1857 | 0 | 0.00% | n/a | 0 | 0 |
| 1858 | 0 | 0.00% | n/a | 0 | 0 |
| 1859 | 0 | 0.00% | n/a | 0 | 0 |
| 1860 | 0 | 0.00% | n/a | 0 | 0 |
| 1861 | 0 | 0.00% | n/a | 0 | 0 |
| 1862 | 0 | 0.00% | n/a | 0 | 0 |
| 1863 | 1 | 8.33% | 0 | 0 | 1 |
| 1864 | 0 | 0.00% | n/a | 0 | 0 |

| | | | | | |
|---|---|---|---|---|---|
| 1865 | 0 | 0.00% | n/a | 0 | 0 |
| 1866 | 0 | 0.00% | n/a | 0 | 0 |
| 1867 | 0 | 0.00% | n/a | 0 | 0 |
| 1868 | 0 | 0.00% | n/a | 0 | 0 |
| 1869 | 1 | 8.33% | 0 | 1 | 2 |
| 1870 | 5 | 41.67% | 3 | 0 | 5 |
| 1871 | 1 | 8.33% | 1 | 1 | 2 |
| 1872 | 0 | 0.00% | n/a | 0 | 0 |
| 1873 | 2 | 16.67% | 0 | 0 | 2 |
| 1874 | 4 | 33.33% | 1 | 0 | 4 |
| 1875 | 0 | 0.00% | n/a | 0 | 0 |
| 1876 | 0 | 0.00% | n/a | 0 | 0 |
| 1877 | 0 | 0.00% | n/a | 0 | 0 |
| 1878 | 1 | 8.33% | 1 | 0 | 1 |
| 1879 | 4 | 16.67% | 2 | 0 | 4 |
| 1881 | 0 | 0.00% | n/a | 0 | 0 |
| 1883 | 0 | 0.00% | n/a | 1 | 1 |
| 1885 | 1 | 4.17% | n/a | 1 | 2 |
| 1887 | 3 | 12.50% | 1 | 0 | 3 |
| 1889 | 4 | 16.67% | 1 | 0[353] | 4 |
| 1891 | 1 | 4.17% | 0 | 0 | 1 |
| 1893 | 1 | 4.17% | 1 | 0 | 1 |
| 1895 | 3 | 12.50% | 2 | 0 | 3 |
| 1897 | 0 | 0.00% | n/a | 0 | 0 |
| 1899 | 0 | 0.00% | n/a | 0 | 0 |
| 1901 | 0 | 0.00% | n/a | 0 | 0 |
| 1903 | 2 | 0.00% | 2 | 0 | 2 |
| 1905 | 0 | 0.00% | n/a | 0 | 0 |
| 1907 | 0 | 0.00% | n/a | 0 | 0 |
| 1909 | 1 | 4.17% | 1 | 0 | 1 |
| 1911 | 1 | 4.17% | 0 | 0 | 1 |
| 1913 | 4 | 16.67% | 2 | 0 | 4 |

[353] The Constitution was amended in 1889 to provide that vacancies that occurred during the session were filled by special election.

## *APPENDIX D: SENATE VACANCIES IN MASSACHUSETTS AND NEW HAMPSHIRE BY PARTY AFFILIATION*

### *First Party System*

| | *New Hampshire* | | *Massachusetts* | |
|---|---|---|---|---|
| Year | Vacancies | Filled by majority | Vacancies | Filled by majority |
| 1796 | n/a | | 7 | 5 |
| 1797 | n/a | | 1 | 1 |
| 1798 | n/a | | 0 | 0 |
| 1799 | n/a | | 10 | 10 |
| 1800 | n/a | | 6 | 6 |
| 1801 | 3 | 2 | 12 | 11[354] |
| 1802 | 2 | 2 | 4 | 4 |
| 1803 | 2 | 1 | 4 | 2 |
| 1804 | 1 | 1 | 4 | 4 |
| 1805 | 1 | 1 | 1 | 1 |
| 1806 | 2 | 2 | 1 | 0[355] |
| 1807 | 1 | 1 | 1 | 0[356] |
| 1808 | 2 | 2 | 3 | 3 |
| 1809 | n/a | | n/a | |
| 1810 | n/a | | 1 | 1 |
| 1811 | 1 | 1 | n/a | |
| 1812 | 2 | 2 | 4 | 4 |

[354] The 1 exception occurred because only members of the opposition party were eligible. *Massachusetts 1801 State Senate, Essex County, Special*, A NEW NATION VOTES: AMERICAN ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/catalog/44558d50p [https://perma.cc/E62S-RNJF] (last visited Feb. 6, 2020).

[355] The 1 exception occurred because only members of the opposition party were eligible. *Massachusetts 1806 State Senate, Oxford and York Counties*, A NEW NATION VOTES: AMERICAN ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/catalog/qn59q5462 [https://perma.cc/KTT6-S6PM] (last visited Feb. 6, 2020).

[356] The 1 exception occurred because only members of the opposition party were eligible. *Massachusetts 1807 State Senate, Worcester County, Special*, A NEW NATION VOTES: AMERICAN ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/catalog/8w32r585s [https://perma.cc/S93B-FECS] (last visited Feb. 6, 2020).

| | | | | |
|---|---|---|---|---|
| 1813 | 1 | 1 | n/a | |
| 1814 | n/a | | n/a | |
| 1815 | 1 | 1 | 3 | 2[357] |
| 1816 | n/a | | 1 | 1 |
| 1817 | n/a | | 2 | 2 |
| 1818 | 2 | 2 | 4 | 3[358] |
| 1819 | 4 | 4 | 1 | 1 |
| 1820 | 3 | 3 | 3 | 3 |
| 1821 | 2 | 2 | 5 | 3 |

***Second Party System***

| | ***New Hampshire*** | | ***Massachusetts*** | |
|---|---|---|---|---|
| Year | Vacancies | Filled by majority | Vacancies | Filled by majority |
| 1833 | 1 | 1 | n/a | |
| 1834 | n/a | | 20 | 20 |
| 1835 | n/a | | 6 | 6 |
| 1836 | n/a | | 2 | 1[359] |
| 1837 | n/a | | 2 | 2 |
| 1838 | n/a | | 0 | 0 |
| 1839 | n/a | | 17 | 17 |
| 1840 | n/a | | 12 | 7[360] |
| 1841 | 1 | 1 | 4 | 4 |
| 1842 | n/a | | 5 | 5 |

[357] The 1 exception occurred because only members of the opposition party were eligible. *Massachusetts 1815 State Senate, Plymouth County*, A New Nation Votes: American Election Returns 1787–1825, https://elections.lib.tufts.edu/catalog/dn39x191k [https://perma.cc/J7LK-LMVR] (last visited Feb. 6, 2020).

[358] The 1 exception occurred because only members of the opposition party were eligible. *Massachusetts 1818 State Senate, Worcester County*, Tufts Univ.: A New Nation Votes: American Election Returns 1787–1825, https://elections.lib.tufts.edu/catalog/c821gm215 [https://perma.cc/2LCU-Z5LJ] (last visited Feb. 6, 2020).

[359] The 1 exception occurred because only Democratic candidates were eligible to be selected by the Whig legislature.

[360] These exceptions occurred because of intra-party disagreements over liquor control laws. *Massachusetts Legislature*, *supra* note 164, at 1.

| | | | | |
|---|---|---|---|---|
| 1843 | 3 | 3 | 16 | 1[361] |
| 1844 | 3 | 3 | 23 | 23 |
| 1845 | n/a | | 14 | 14 |
| 1846 | 6 | 6 | 31 | 31 |
| 1847 | 3 | 3 | 17 | 17 |
| 1848 | 1 | 1 | 23 | 23 |
| 1849 | n/a | | 23 | 23 |
| 1850 | n/a | | 6 | 6 |
| 1851 | n/a | | 8 | 5[362] |
| 1852 | 2 | 2 | 12 | 11[363] |
| 1853 | 1 | 1 | 22 | 22 |
| 1854 | 2 | 2 | 19 | 19 |
| 1855 | 1 | 1 | n/a | |
| 1856 | n/a | | n/a | |

### *Third and Fourth Party Systems*

| ***New Hampshire*** | | |
|---|---|---|
| Year | Vacancies | Filled by majority vote |
| 1863 | 1 | 1 |
| 1869 | 2 | 1[364] |
| 1870 | 5 | 5 |
| 1871 | 2 | 1[365] |

[361] These exceptions occurred because a member of the Whig majority voted for some, but potentially not all, Democratic candidates. *Supra* note 165 and accompanying text.

[362] These exceptions occurred because of difficulties in navigating the Democratic–Free Soil coalition, intra-coalition disagreements over liquor control laws, and because in one of the races, only Whig candidates were eligible to be selected by the coalition legislature. *Supra* notes 165-166 and accompanying text.

[363] This exception likely occurred because of difficulties in navigating the Democratic–Free Soil coalition and because of intra-coalition disagreements over liquor control laws. *General Court*, *supra* note 164, at 3.

[364] This exception occurred because the only eligible candidates were Republicans. *Supra* note 170 and accompanying text.

[365] This exception occurred because the only eligible candidates were Republicans. *Supra* note 171 and accompanying text.

| | | |
|---|---|---|
| 1873 | 2 | 2 |
| 1874 | 4 | 4 |
| 1878 | 1 | 1 |
| 1879 | 4 | 4 |
| 1883 | 1 | 0[366] |
| 1885 | 2 | 1[367] |
| 1887 | 3 | 3 |
| 1889 | 4 | 4 |
| 1891 | 1 | 1 |
| 1893 | 1 | 1 |
| 1895 | 3 | 3 |
| 1903 | 2 | 1[368] |
| 1909 | 1 | 1 |
| 1911 | 1 | 1 |
| 1913 | 4 | 4 |

[366] This exception occurred because the only eligible candidates were Democratic and Greenback Party candidates. *Supra* note 168 and accompanying text.

[367] This exception occurred because the only eligible candidates were Democratic and Prohibition Party candidates. *Supra* note 172 and accompanying text.

[368] This exception occurred because the only eligible candidates were Democratic and Independent Labor candidates. *Supra* note 169 and accompanying text.